

13  
No. 90-18-CFX  
Status: GRANTED

Title: Robert D. Gilmer, Petitioner  
v.  
Interstate/Johnson Lane Corporation

Docketed:  
June 26, 1990

Court: United States Court of Appeals  
for the Fourth Circuit

Counsel for petitioner: Allred, John T.

Counsel for respondent: Spears Jr., James B.

NOTE: See mail label re dock dt

Entry	Date	Note	Proceedings and Orders
1	Jun 26 1990	G	Petition for writ of certiorari filed.
2	Jul 27 1990		Brief of respondent Interstate/Johnson Lane Corp. in opposition filed.
3	Aug 1 1990		DISTRIBUTED. September 24, 1990
4	Oct 1 1990		Petition GRANTED. limited to Question 1 presented by the petition. *****
5	Nov 15 1990		Record filed.
		*	Certified copy of original record and proceedings, 3 volumes, received.
6	Nov 15 1990		Brief amicus curiae of AFL-CIO filed.
7	Nov 15 1990		Brief amicus curiae of American Association of Retired Persons filed.
8	Nov 15 1990		Joint appendix filed.
9	Nov 15 1990		Brief of petitioner filed.
10	Nov 15 1990		Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
11	Nov 23 1990		SET FOR ARGUMENT MONDAY, JANUARY 14, 1991. (3RD CASE)
13	Nov 27 1990	D	Motion of respondent to strike portions of amici curiae briefs filed.
12	Nov 28 1990		CIRCULATED.
14	Nov 30 1990		DISTRIBUTED. Dec. 4, 1990. (Motion of respondent to strike portions of amici curiae briefs).
15	Dec 10 1990		Motion of respondent to strike portions of amici curiae briefs DENIED.
16	Dec 19 1990	X	Brief amicus curiae of Center for Public Resources, Inc. filed.
17	Dec 19 1990	X	Brief amicus curiae of Chamber of Commerce of the United States filed.
18	Dec 19 1990	X	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
19	Dec 19 1990	X	Brief amicus curiae of Securities Industry Association, Inc. filed.
20	Dec 19 1990	X	Brief of respondent Interstate/Johnson Corp. filed.
21	Jan 14 1991		ARGUED.

90-18

No. \_\_\_\_\_

Supreme Court, U.S.

FILED

JUN 26 1990

JOSEPH F. SPANIO, JR.  
CLERK

In The  
Supreme Court of the United States  
October Term 1989

ROBERT D. GILMER,

Petitioner,

vs.

INTERSTATE/JOHNSON LANE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Are claims brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. ("ADEA"), subject to compulsory arbitration?

2. Is an arbitration clause executed six years before any claim arises under the ADEA an invalid prospective waiver?

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Petitioner Robert Gilmer (hereinafter "Gilmer") respectfully prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Fourth Circuit issued on February 6, 1990.

## I.

### CITATION TO OPINIONS BELOW

The decision of the Fourth Circuit is officially reported at 895 F.2d 195. The Court's decision appears in Appendix "A," infra (App. 1a-36a.) The decision of the Fourth Circuit denying Gilmer's petition for rehearing and suggestion for rehearing in banc appears in Appendix "B," infra. (App. 37a.)

## II.

### JURISDICTION

The decision of the Fourth Circuit was issued on February 6, 1990. Gilmer's petition for rehearing and suggestion for rehearing in banc were denied on March 28, 1990. This petition for writ of certiorari was filed within 90 days of that date as provided for under 28 U.S.C. § 2101(c) and Rule 13(1) of the Rules of United States Supreme Court. This

Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### III.

#### STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act (9 U.S.C. § 2) provides as follows:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Age Discrimination in Employment Act provides in pertinent part as follows (29 U.S.C. § 626(c)):

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the

purposes of this chapter: provided that the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this Chapter.

(2) In an action brought under Paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

### IV.

#### STATEMENT OF THE CASE

##### A. THE FACTS

Defendant Interstate Securities Corporation ("Interstate") hired Gilmer on May 18, 1981, as Manager of Financial Services. One week after he was hired, Gilmer was required to sign a registration application with the New York Stock Exchange ("NYSE"). Paragraph V of the registration form provides as follows: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be



arbitrated under the rules, constitutions or bylaws of the organizations with which I register. . . ." NYSE Rule 347 provides for the arbitration of "[a]ny controversy . . . arising out of the employment or termination of employment" of a registered securities representative.

More than six years later, Interstate terminated Gilmer's employment. Gilmer was 62 years old when he was fired, and his duties were reassigned to a 28-year-old who was less qualified. Gilmer then filed suit under the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. § 621, et seq., hereinafter referred to as "ADEA"), to secure reinstatement and full restitution in payment of all lost wages and benefits resulting from his discharge. The jurisdiction of the court was conferred by § 7(c) of the ADEA (29 U.S.C. § 626(c)) and § 15(b) of the Fair Labor Standards Act (29 U.S.C. § 216(b)).

Interstate filed a motion to compel arbitration and to dismiss Gilmer's complaint because of the arbitration clause in the NYSE registration application.

## B. PROCEDURAL HISTORY

The U.S. District Court for the Western District of North Carolina held that Gilmer could not be compelled to arbitrate his ADEA claim. (App. 39a-42a.)

Interstate appealed to the Fourth Circuit and was granted a stay of the district court proceedings pending appeal.

The Fourth Circuit, on February 6, 1990, reversed the District Court's decision, concluding that there was no indication of congressional intent to bar compulsory arbitration of ADEA claims and that there was no invalid prospective waiver of Gilmer's ADEA claims. (App. 1a-36a.)

Gilmer then petitioned the Fourth Circuit for rehearing and suggestion for rehearing in banc. By order dated March 28, 1990, the Fourth Circuit denied the petition. (App. 37a-38a.)



V.

REASONS FOR GRANTING THE WRIT

A. ADEA CLAIMS ARE NOT SUBJECT TO  
COMPULSORY ARBITRATION UNDER THE  
FEDERAL ARBITRATION ACT

This case concerns whether a plaintiff can be compelled to arbitrate claims under the ADEA. The Fourth Circuit's decision that such claims are subject to compulsory arbitration creates a split in the circuits. Every other circuit deciding the issue has held that ADEA claims or claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et. seq. (hereinafter "Title VII"), are not subject to compulsory arbitration.

This Court has held that an agreement to arbitrate does not prevent an employee from seeking judicial relief for statutory claims. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011 (1974) (Title VII); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 101 S.Ct. 1437 (1981) (Fair Labor Standards Act); McDonald v. City of West Branch, 466 U.S. 284, 104 S.Ct. 1799 (1984) (42 U.S.C. § 1983). In Gardner-

Denver, this Court unanimously held that an employee alleging violations of Title VII was entitled to a trial de novo after his claim was arbitrated unsuccessfully. Where the appropriateness of arbitration is concerned, there is no meaningful distinction between Title VII and the ADEA. See, e.g., Lorillard v. Pons, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.E.2d 40 (1978), in which this Court stated that "the prohibitions of the ADEA were derived in haec verba from Title VII."

See also Barrentine (plaintiff bringing claim under Fair Labor Standards Act not barred by unfavorable decision of arbitrator); McDonald (arbitrator's decision in civil rights case under 42 U.S.C. § 1983 has no res judicata or collateral estoppel effect, regardless of whether parties had agreement to contrary). These cases, all dealing with statutes analogous to the ADEA, indicate that ADEA claims should not be subject to compulsory arbitration.

However, subsequent decisions of the Court in cases not involving employment discrimination have created confusion with regard to whether Gardner-Denver,

Barrentine, and McDonald have continued viability. In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346 (1985), the Court held that arbitration was not necessarily precluded simply because a plaintiff was invoking a statutory right. Rather, the Court stated, agreements to arbitrate were enforceable unless either 1) the dispute was outside the scope of the arbitration clause, or 2) Congress evidenced an intent to preclude arbitration.

Of course, the Court implicitly followed the Mitsubishi analysis in Gardner-Denver, Barrentine, and McDonald: it acknowledged the strong federal policy favoring arbitration and examined congressional intent with respect to the statutes at issue. Nonetheless, the Fourth Circuit found that the three cases were displaced by Mitsubishi (Sherman Act claims subject to compulsory arbitration) as well as Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 2332 (1987) (arbitration of claims under Securities Exchange Act of 1934 not precluded) and Rodriguez de Quijas v. Shearson/American

Express, Inc., 109 S.Ct. 1917 (1989) (arbitration of claims under Securities Act of 1933 not precluded).

The Fourth Circuit's opinion fails to recognize that Mitsubishi, McMahon and Rodriguez each involved disputes arising out of a business context. This Court in Gardner-Denver distinguished such claims from cases where a plaintiff was alleging employment discrimination:

Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. . . . [T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.



415 U.S. at 56-57, 94 S.Ct. at 1023-24, 39 L.Ed.2d at 163 (citations and footnote omitted).

Every circuit that has decided the issue, except the Fourth, has refused to compel arbitration, following the reasoning of Gardner-Denver even though acknowledging the strong federal policy favoring arbitration. See Nicholson v. CPC International, Inc., 877 F.2d 221 (3d Cir. 1989) (ADEA); Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989) (Title VII); Swenson v. Management Recruiters International Inc., 858 F.2d 1304 (8th Cir. 1988) (Title VII). The present case has thus resulted in a split between the Fourth Circuit and the Third, First and Eighth Circuits.

This Court needs to explicitly apply the Mitsubishi test in the employment discrimination context to resolve the split in the circuits and to clarify that the reasoning of Gardner-Denver, Barrentine and McDonald is entirely consistent with the Court's more recent pronouncements with regard to arbitration.

B. THE REGISTRATION FORM THAT GILMER WAS REQUIRED TO SIGN WAS AN INVALID PROSPECTIVE WAIVER

The Fourth Circuit also held that the NYSE registration form that Gilmer signed a week after he was hired was not an invalid prospective waiver of his rights under the ADEA. This holding, too, creates a split in the circuits. Three other circuits have held to the contrary even where the plaintiff is waiving his right to a judicial forum, as opposed to his substantive rights under the statute. See Nicholson, supra (ADEA) Utley, supra (Title VII); Swenson, supra (Title VII). Nicholson, Utley and Swenson each involved agreements to arbitrate that were signed long before any claim arose, and in each case the court held that a plaintiff could not prospectively waive his right to a jury trial on the issue of employment discrimination.

Finally, Gilmer submits that the Fourth Circuit erred in its decision as to whether the application signed by Gilmer was a "knowing and voluntary" waiver. The majority opinion states that

Gilmer "never asserted that his waiver was anything other than knowing and voluntary." (App. 20a.) In fact, Gilmer has raised this issue at every point in the proceeding: it was raised in oral argument in the district court, see J.A. at 20, 14; in Appellee's Brief at 10; at oral argument before the Fourth Circuit; and in Gilmer's Petition for Rehearing in Suggestion for Rehearing in Banc at 6-7. Moreover, Gilmer at every stage of the proceeding raised the issue that the registration form was unsupported by consideration because it was signed more than a week after Gilmer was hired. The lack of consideration is further evidence that Gilmer's waiver, if it existed at all, was neither knowing nor voluntary. This Court has held, and the Fourth Circuit acknowledges, that a waiver of rights under the employment discrimination statutes is invalid unless it is knowing and voluntary. Gardner-Denver, 415 U.S. at 52 n. 15.

Gilmer submits that this Court should also grant certiorari to clarify what constitutes a valid waiver of rights under the ADEA.

VI.

CONCLUSION

For the aforesaid reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 88-1796

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ROBERT D. GILMER,  
Plaintiff - Appellee,

versus

INTERSTATE/JOHNSON  
LANE CORPORATION,  
formerly known as  
Interstate Securities  
Corporation,Defendant - Appellant.

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Appeal from the United  
States District Court  
for the Western District  
of North Carolina, at  
Charlotte. James B.  
McMillan, Senior District  
Judge. (CA-88-396-M-C-C).

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Argued:  
November 2, 1989Decided:  
February 6, 1990

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Before WIDENER and WILKINSON, Circuit  
Judges, and YOUNG, Senior United States  
District Judge for the District of  
Maryland, sitting by designation.

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James Bernard Spears, Jr. (Robert S.  
Phifer, HAYNSWORTH, BALDWIN, MILES,  
JOHNSON, GREAVES AND EDWARDS, P.A., on  
brief) for Appellant. W.R. Loftis, Jr.  
(John T. Allred, Robin E. Shea, PETREE,  
STOCKTON & ROBINSON, on brief) for  
Appellee.

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WILKINSON, Circuit Judge:

The question before us is whether an agreement between an individual employee and his employer compelling arbitration of all claims arising out of employment is enforceable when the claim against the employer is one for violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 et seq. (1982 & Supp. 1986). The district court ruled that such an arbitration agreement is not enforceable in the face of a claim arising under the ADEA. Because we find no congressional intent to preclude enforcement of arbitration agreements in the ADEA's text, its legislative history, or its underlying purposes, see Shearson/ American Express Inc. v. McMahon, 107 S. Ct. 2332 (1987), we reverse the judgment of the district court.

I.

Robert D. Gilmer was hired by Interstate/Johnson Lane in May 1981 as a manager of financial services. As required for his employment, Gilmer registered as a securities representative with the New York Stock Exchange. Gilmer's application for his securities registration contained an arbitration

clause pursuant to which he agreed to the arbitration of any disputes between himself and his employer arising out of his employment or the termination of his employment.<sup>1</sup>

In November 1987, Gilmer's employment was terminated. In August 1988, he brought suit against Interstate in federal court alleging that his termination violated the ADEA. Interstate filed a motion to compel arbitration as

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<sup>1</sup>Paragraph 5 of Gilmer's securities registration application provided: "I agree to arbitrate any dispute, claim or controversy that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register . . . ." Rule 347 of the New York Stock Exchange states:

Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

authorized under the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. The district court denied the motion, ruling that arbitration procedures are inadequate for the final resolution of rights created by the ADEA and that Congress intended to protect ADEA plaintiffs from waiver of the judicial forum.

Interstate appeals. 28 U.S.C. § 1292(a)(1).

## II.

In a trilogy of recent cases, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332 (1987), and Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917 (1989) the Supreme Court has endorsed arbitration as an effective and efficient means of dispute resolution.<sup>2</sup> The Court has emphasized that the Federal Arbitration Act (FAA) "establishes a 'federal policy

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<sup>2</sup>The dissenting opinion mentions none of these three cases (or other related decisions). It is astonishing to believe that it would ignore entirely the Supreme Court's recent pronouncements on the very subject of this case.

favoring arbitration," McMahon, 107 S. Ct. at 2337 (quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983)), which "is at bottom a policy guaranteeing the enforcement of private contractual arrangements," Mitsubishi, 473 U.S. at 625. Under the FAA, enforcement of an arbitration agreement is equally appropriate whether the parties have agreed to arbitrate rights created by contract or by statute, since "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Id. at 628. An arbitration agreement is unenforceable only if Congress has evinced an intention to preclude waiver of the judicial forum for a particular statutory right, or if the agreement was procured by fraud or use of excessive economic power. See id. at 627-28; McMahon, 107 S. Ct. at 2337.

The McMahon Court established the framework for determining whether an arbitration agreement is enforceable under the FAA. The Court ruled that the



Act standing alone mandates enforcement of arbitration agreements, but that Congress can override this mandate by indicating that it is precluding waiver of the judicial forum for the particular statutory right at issue. The burden is on the party opposing arbitration to show that Congress intended to preclude waiver. Congressional intent is to be deduced from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes. McMahon, 107 S. Ct. at 2337-38 (citing Mitsubishi, 473 U.S. at 628, 632-37).

We find nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements. Arbitration is nowhere mentioned in the text of the statute, and "[t]his silence in the text is matched by silence in the statute's legislative history." McMahon, 107 S. Ct. at 2344. Nor is there any statement on the part of Congress to indicate that a federal judicial forum is the only appropriate forum for vindication of the rights created by the ADEA. Moreover, we

see no conflict between arbitration and the underlying purposes of the ADEA which would preclude arbitration of ADEA claims.

The Third Circuit majority in Nicholson v. CPC Int'l. Inc., 877 F.2d 22 (3d Cir. 1989), which refused to enforce arbitration of an ADEA claim, conceded that in the statutory language and legislative history of the ADEA it could "find no direct reference to arbitration" and that it was therefore forced to "draw inferences from Congress' actions." Id. at 225. Courts should be reluctant, however, to imply in a statute an intention to preclude enforcement of arbitration agreements where Congress has not expressed one, particularly in light of the countervailing intention expressed by Congress in the FAA. Gilmer has nonetheless advanced numerous arguments why we should do so, and we shall proceed to address them.

### III.

Gilmer argues, in reliance upon Nicholson, that congressional intent to preclude waiver of the judicial forum can be surmised from the role Congress has established for the Equal Employment

Opportunity Commission (EEOC) in the enforcement of the ADEA. The ADEA empowers the EEOC to investigate age discrimination claims and to bring enforcement actions to ensure compliance with the statute's provisions. 29 U.S.C. § 626(a), (b). The EEOC is authorized to inspect places of employment, to question employees, and to impose recordkeeping and reporting requirements on employers. 29 U.S.C. § 626(a). It may also endeavor to effect voluntary compliance with ADEA provisions through informal methods of conciliation, conference, and persuasion. 29 U.S.C. § 626(b). Gilmer contends, again by reference to Nicholson, that if arbitration agreements are enforced, the EEOC will no longer be able to function as a protector of employee rights under the ADEA. He argues that since filing a charge with the EEOC is not a prerequisite for arbitral action as it is for judicial action under the ADEA, an employee who is required to adhere to his agreement and proceed to arbitration will no longer file a charge. Thus, he maintains, the EEOC will be deprived of the charge both as an incentive to undertake conciliation and as notification in case

it wishes to institute an enforcement action.

We disagree. The EEOC's continued effectiveness is not now, nor has it ever been, dependent on its participation in the resolution of all claims under the ADEA. For example, it is well-settled that an individual may voluntarily settle his ADEA claims without EEOC involvement. See Moore v. McGraw Edison Co., 804 F.2d 1026, 1033 (8th Cir. 1986); Runyan v. National Cash Register Corp., 787 F.2d 1039, 1044-45 (6th Cir. 1986). Arbitration can achieve much the same vindication of individual rights and relief of agency dockets as voluntary, non-supervised settlements. See Coventry v. United States Steel Corp., 856 F.2d 514, 522 n.8 (3d Cir. 1988). Of course, nothing about the arbitral process would preclude an individual from filing a general charge against his employer with the EEOC which the EEOC would be empowered to investigate, conciliate, or enforce through litigation. We do not think, however, that implementation of the statutory purpose is dependent upon the EEOC's involvement in each and every allegation of age discrimination. For



example, if the ADEA complainant prevails at arbitration, the EEOC may indeed be deprived of a charge; however, it is difficult to see what difference EEOC involvement would have made in the vindication of that litigant's rights.

Further, we think it clear that Congress contemplated that entities other than the EEOC and federal courts would play important roles in remedying age discrimination. See Mathis v. Allied Wholesale Distributors, Inc., 680 F. Supp. 1545, 1547 (M.D. Ga. 1988) (state courts possess concurrent jurisdiction over ADEA suits). The premise of the Federal Arbitration Act is the availability to parties of multiple forums rather than the imposition upon them of a single forum. If litigants believe that arbitration offers a prompt, more expert, and less expensive way to resolve their differences, Congress has decreed that such an option be open to them. See Mitsubishi, 473 U.S. at 628. We are reluctant to conclude that the mere fact of administrative involvement in a statutory scheme of enforcement operates as an implicit exception to the presumption of arbitral availability under the FAA. The

availability of arbitration under the securities acts in Rodriguez and McMahon indicates that arbitrability is not precluded by the presence of an agency with statutory powers of enforcement, see 15 U.S.C. §§ 77t, 78u (Securities and Exchange Commission (SEC) right to bring enforcement actions). While there are, of course, differences between the role of the SEC under the securities acts and that of the EEOC under the ADEA, namely the filing of a charge as a precondition to a lawsuit under the latter statute, these differences do not rise to the level of an affirmative congressional expression of waiver preclusion. As we have noted, the roles of arbitration and the EEOC are harmonious because neither the filing of an individual charge nor an action of agency enforcement is in any way forbidden by the election of arbitration.

Gilmer also contends that congressional intent to preclude waiver can be found in the funding statute for the EEOC. He points to language in the statute directing "[t]hat none of the funds may be obligated or expended by the Commission to give effect to any policy



or practice pertaining to unsupervised waivers under the Age Discrimination in Employment Act." P.L. No. 100459, 102 Stat. 2186, 2216 (1988); see also P.L. No. 100202, 101 Stat. 1329, 1329-31 (1987). We find nothing in this statement to indicate, however, that Congress intended to preclude waiver of a procedural right such as forum selection; instead, we think Congress was referring to waiver of the substantive rights guaranteed by the ADEA. Even if Congress were prohibiting disbursement of EEOC funds to encourage arbitration of ADEA claims, we would be hesitant to find congressional intent to preclude entirely the enforcement of arbitration agreements in a source with so attenuated a connection to the ADEA as the EEOC funding statute.

Even if the statutory enforcement powers of the EEOC would not be impaired, Gilmer argues that arbitration is inconsistent with the ADEA's placement of initial adjudicatory authority in a court rather than an agency. He points, by way of Nicholson, to the fact that Congress declined to adopt for the ADEA an enforcement scheme modeled after the National Labor Relations Act (NLRA),

instead choosing a scheme modeled after the Fair Labor Standards Act (FLSA). He argues that this choice indicates a congressional preference for the resolution of ADEA disputes in a judicial, rather than an arbitral, forum.

We again disagree. The enforcement model based on the NLRA which Congress rejected provided for the resolution of age discrimination claims in agency proceedings with judicial review available through petition to the federal courts of appeals. See 13 Cong. Rec. 2795 (1967), reprinted in EEOC, Legislative History of the Age Discrimination in Employment Act 69 (98 [hereinafter ADEA History]). The enforcement model based on the FLSA which Congress ultimately adopted authorized the Secretary of Labor (later the EEOC) to enforce the ADEA through investigation, conciliation, and, if necessary, through enforcement actions brought in the courts. See H.R. Rep. No. 805, 90th Cong., 1st Sess. 5-6 (1967), reprinted in ADEA History at 78-79; U.S. Code & Admin. News 1967, p. 2213; Sen. Rep. No. 723, 90th Cong., 1st Sess. 5, 13-14 (1967) reprinted in ADEA History at 109, 117-18.

However, this choice of courts over agencies as the initial forum for the resolution of ADEA disputes says nothing about Congress' attitude toward arbitration. Unlike either courts or agencies, arbitration is a forum selected by mutual agreement of the parties. Congress' choice of an enforcement scheme in which ADEA suits are brought in a judicial forum simply does not manifest an intention to prevent parties from reaching a private contractual agreement to submit their disputes to arbitration.

Gilmer next argues that the broader remedial powers possessed by courts over arbitrators indicate a congressional intent to preclude waiver. He asserts that arbitrators do not command the power to award broad equitable relief which courts possess under 29 U.S.C. § 626(b) (empowering courts "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter"). He emphasizes in particular that arbitrators lack the power to issue injunctive relief to prevent employers from engaging in future acts of discrimination, and that class actions cannot be maintained in arbitration.

We are unconvinced. Arbitrators enjoy broad equitable powers. They may grant whatever remedy is necessary to right the wrongs within their jurisdiction. Arbitrators may, for instance, order reinstatement or promotion of an employee adversely affected by age discrimination. See Nicholson, 877 F.2d at 240 (Becker, J., dissenting). Of course, the question of the full extent of an arbitrator's powers is not before us. However, any lack of congruence which may exist between the remedial powers of a court and those of an arbitrator is hardly fatal to arbitration. So long as arbitrators possess the equitable power to redress individual claims of discrimination, there is no reason to reject their role in the resolution of ADEA disputes. That arbitrators may lack the full breadth of equitable discretion possessed by courts to go beyond the relief accorded individual victims does not deny the utility of this alternative means of resolving disputes. In enacting the FAA and the ADEA, Congress must have been aware of the respective spheres of judicial and arbitral authority and it expressed no



intention that the latter be displaced. See Rodriguez v. United States, 107 S. Ct. 1391, 1393 (1987) (in passing a statute, Congress is presumed to act "with full awareness" of existing legislation).

We are similarly unpersuaded by Gilmer's contention that the ADEA's provision of a right to jury trial indicates a congressional intent to preclude waiver. The ADEA provides only that a litigant be entitled to a jury trial should he desire it; it does not mandate that every ADEA trial be a trial by jury. ADEA litigants plainly are permitted to waive trial by jury. See Washington v. New York City Bd. of Estimate, 709 F.2d 792, 797-99 (2d Cir. 1983); Sarnhorst v. Independent School Dist. #70, 686 F.2d 637 641 8th Cir. 1982). If that waiver is permitted, we fail to see how the preference of parties for an arbitral forum has somehow been silently proscribed.

Nor could Gilmer successfully contend that the ADEA's provision of liquidated damages for willful violations, 29 U.S.C. § 626(b), evinces an intent to preclude waiver of the judicial

forum. In Mitsubishi and McMahon, the Supreme Court rejected arguments that arbitration would vitiate the treble damages provisions in the Clayton Act and the Racketeer Influenced and Corrupt Organizations Act. See Mitsubishi, 473 U.S. at 635-37; McMahon, 107 S.Ct. at 2344-45. While recognizing that the treble damages provisions are primarily compensatory in nature, the Court emphasized that those provisions, like that for liquidated damages under the ADEA, play an important role in deterrence. See Mitsubishi, 473 U.S. at 635-36 (Clayton Act); McMahon, 107 S. Ct. at 2345 (RICO statute); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985) (ADEA). In fact, it would be the unusual statute whose remedial provisions did not serve both compensatory and deterrent purposes. This mixing of compensatory and deterrent functions in the remedial provisions of a statute in no way interferes with an arbitrator's ability to effectuate the purposes of a statute. There is no reason, for example, why an arbitrator of an ADEA dispute cannot award liquidated damages should he or she find a willful violation

of the statute. "[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Mitsubishi, 473 U.S. at 637. Even if arbitration were somehow thought to impinge on the ability of the ADEA's liquidated damages provision to fulfill its role as a deterrent to willful violations of the statute, it certainly would not interfere with the ordinary, run-of-the-mill ADEA case which does not implicate the liquidated damages remedy. See McMahon, 107 S. Ct. at 2345.

Gilmer also argues that the arbitration agreement should not be enforced because it constituted a prospective waiver. This plainly is not the law. Prospective waiver of the judicial forum lies at the heart of the FAA, where it is not only permitted but encouraged. In addition, prospective waivers were clearly approved in Mitsubishi, McMahon, and Rodriguez. In all three cases, the Court enforced arbitration agreements which were entered into before the cause of action at issue arose. See Mitsubishi, 473 U.S. at 617-18; McMahon, 107

S. Ct. at 2335-36; Rodriguez, 109 S. Ct. at 1918-19. If, however, Gilmer means that prospective waivers must be examined to determine whether they were knowing and voluntary, then this certainly is true. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974). However, Gilmer has never asserted that his waiver was anything other than knowing and voluntary, nor is there anything to lead us to that conclusion.

Our holding is further buttressed by the fact that it is well-established that federal courts need not always be the forum for the resolution of ADEA claims. The grant of concurrent jurisdiction to state and federal courts in the ADEA allows ADEA claimants to bring their claims in state court in the first instance. See Mathis, 680 F. Supp. at 547; Jacobi v. High Point Label, Inc., 442 F. Supp. 518, 520 (M.D.N.C. 1977). Thus, Congress clearly did not intend that all ADEA disputes be resolved in federal court; rather, it contemplated a more flexible scheme for the resolution of individual ADEA claims. In fact, Congress' grant of concurrent jurisdiction over ADEA suits may evince an



affirmative intent, apart from that contained in the FAA, to permit waiver of the judicial forum. In Rodriguez, the Court noted that congressional legislation providing for concurrent jurisdiction constituted an "explicit authorization for complainants to waive [federal court procedural] protections by filing suit in state court." 109 S. Ct. at 92. The Court went on to declare that "arbitration agreements, which are 'in effect, a specialized kind of forum-selection clause,' should not be prohibited . . . since they like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." Id. at 1921 (quoting Scherk v. Alberto-Culver Co., 417 US. 506, 519 (1974)). The grant of concurrent jurisdiction in the ADEA evidences, if anything, a congressional intent to provide a broad right of forum selection, including the right to elect arbitration.

Finally, there is no reason to suppose that ADEA claims are inherently ill-suited to arbitration. They involve

in the main simple, factual inquiries. In ruling that antitrust and RICO claims were not beyond the ken of arbitrators, the Supreme Court brushed aside objections that such statutory claims were too complex for arbitrators to handle. See McMahon, 107 S. Ct. at 2344. ADEA disputes are, to put it mildly, no more generically complex than claims pressed under the Sherman Act and RICO. That a proof scheme has evolved to establish a case of age discrimination should not delude courts into thinking that the ultimate question in ADEA cases is of a type which only federal judges are capable of resolving. In fact, ADEA disputes are often presented to the jury as requiring resolution of a single question of ultimate fact involving assessment of credibility and of disputed rationales for employer action. We have noted that "[i]n cases of this type, the best charge may simply be one that emphasizes that plaintiff must prove, by a preponderance of the evidence, that he was discharged because of his age . . . ." Nelson v. Green Ford, Inc., 788 F.2d 205, 209 (4th Cir. 1986) (quoting Loeb v. Textron, 600 F.2d 1003, 1018 (1st



Cir. 1979)). Whether a particular employee was maltreated on account of his age is a straightforward factual matter that is well within the capabilities of an arbitrator, and the presumption of arbitrability in the FAA must therefore apply.

#### IV.

Gilmer points to three cases decided before the Supreme Court's recent trilogy and argues that those cases are controlling here. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Court held that an employee required to arbitrate under a collective-bargaining agreement was entitled to a trial de novo on his Title VII claim despite having lost at arbitration. Gilmer argues that because Title VII and the ADEA are similar statutory schemes proscribing discrimination in employment, prospective waiver of the judicial forum should be prohibited under the ADEA just as it is under Title VII. Gilmer also cites Barrentine v. Arkansas-Best Freight Systems, 450 U.S. 728 (1981), holding that a claimant under the FLSA was not barred by the unfavorable decision of an arbitrator, and McDonald v. City of West

Branch, 466 U.S. 284 (1984), holding that an arbitrator's decision on a § 1983 claim has no res judicata or collateral estoppel effect. Gilmer notes that these three cases were all cited with approval by the Court in Atchison Topeka & Santa Fe Railway Co. v. Buell, 480 U.S. 557 (1987), a post-Mitsubishi case, and that they therefore survive Mitsubishi.

We find these cases inapposite. First, none of the three even mention the FAA. Therefore, the Court's analysis was not governed by the "'federal policy favoring arbitration' requiring that '[courts] rigorously enforce agreements to arbitrate.'" McMahon, 107 S. Ct. at 2337 (quoting Cone Memorial Hospital, 460 U.S. at 24, and Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)). The cases also question the adequacy of arbitral factfinding procedures and the competence of arbitrators to resolve complex legal questions. See Gardner-Denver, 415 U.S. at 57-58; Barrentine, 450 U.S. at 743-45; McDonald, 466 U.S. at 290-91. In its more recent trilogy of cases, however, the Court explicitly rejected such arguments. In Mitsubishi it stated that "we are well past the time

when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." 473 U.S. at 626-27. In McMahon, it emphasized that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." 107 S. Ct. at 2340. Just last term in Rodriguez, the Court declared that "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants . . . has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." 109 S. Ct. at 1920. Any reluctance to entrust statutory claims to the arbitral process because of the adequacy of arbitral procedures or the competence of arbitrators is clearly no longer well-founded.

Second, Gardner-Denver and McDonald all involved arbitration under collective bargaining agreements. In all three cases, the Court stressed that the statutory schemes at issue were intended to provide individuals with some minimum

level of protection, and that that protection might be lost if a union represented the employee in the grievance proceeding and thus controlled the employee's arbitration. See McDonald, 466 U.S. at 291 n.1. It noted that in arbitration under a collective bargaining agreement, "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." Gardner-Denver, 415 U.S. at 58 n.19; see also Barrentine, 450 U.S. at 742; McDonald, 466 U.S. at 291. Gardner-Denver also recognized, however, that an individual possesses greater authority over his cause of action when he pursues his claim independent of union control. See 415 U.S. at 52. Thus, concern about the divergent interests of employee and union simply does not exist where, as in Gilmer's case, the individual employee has agreed to arbitration of his employment disputes and will be able to press his ADEA claims in arbitration in his individual capacity.

The Court was also troubled in the three earlier cases by the fact that an arbitrator acting under the authority of



a collective bargaining agreement might lack the power to invoke legislation in conflict with the bargain between the parties. See Gardner-Denver, 415 U.S. at 53; Barrentine, 450 U.S. at 744; McDonald, 466 U.S. at 290-91. This concern is likewise nonexistent where arbitration proceeds according to an individual arbitration agreement. Without restrictions like those imposed by the terms of a collective bargaining agreement, an arbitrator will be free to invoke any relevant statute. Moreover, judicial review of the arbitrator's decision, though limited, is "sufficient to ensure that arbitrators comply with the requirements of the statute." McMahon, 107 S. Ct at 2340. For the foregoing reasons we think it clear that Gardner-Denver, Barrentine, and McDonald do not control our decision here.

## V.

Gilmer complains that a reversal in this case would conflict with the holding of the Third Circuit in Nicholson v. CPC Int'l. Inc., 877 F.2d 221 (3d Cir. 1989). We acknowledge that our holding is not in accord with that of the Third Circuit. We find the reasoning of the majority

opinion in Nicholson unpersuasive, and therefore we have respectfully chosen not to follow it. Instead, we are in agreement with Judge Becker's dissent in that case that Congress did not intend to preclude waiver of the judicial forum by ADEA claimants.

Our holding reflects nothing more than the view that courts should not strain to find in statutes what Congress has not put there. We find no congressional intent to preclude waiver of the judicial forum in the text, the legislative history, or the underlying purposes of the ADEA. We recognize that the ADEA embodies without question an important federal policy in prohibiting age discrimination. So too, however, do the Securities Act of 1933 and the Securities Exchange Act of 1934 represent, inter alia, an important federal policy in protecting investors from fraudulent securities transactions. Likewise, the Sherman Act reflects an important federal policy in preventing excessive concentration in relevant markets. Nonetheless, arbitration of claims under these statutes is clearly

encouraged. See Mitsubishi, McMahon, and Rodriguez.

Courts cannot determine whether arbitration agreements are to be enforced by making subjective judgments as to the relative importance of various federal statutes. Rather, Congress must provide clear guidance if it wishes federal courts to refrain from enforcing arbitration agreements when violations of a particular statutory right are alleged. Without such affirmative guidance in the ADEA, we are reluctant to set aside a coordinate federal statute such as the Arbitration Act.

We remain sensitive to the fact that the context in which this case arises differs somewhat from the contexts of Mitsubishi, McMahon and Rodriguez. Whereas the statutes in those cases were primarily commercial in focus, the ADEA is a civil rights statute. Moreover, the complainants in those cases were securities customers and persons injured by antitrust violations, not employees who are allegedly victims of discrimination in the workplace. Although the beneficiaries of statutory protections may vary, the principles of

statutory interpretation do not. As the ADEA is devoid of any congressional statement of intent to preclude waiver of the judicial forum, we reverse the judgment of the district court and remand the case with directions to enter an order compelling arbitration of plaintiff's claim.

REVERSED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I do not believe there is any distinction of significance between this case and Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). I think Alexander is persuasive and would follow that case here.

In Alexander, the collective bargaining agreement, which bound both the plaintiff-employee and his employer, specifically provided against racial discrimination and for arbitration of all claims with respect to employment.

Plaintiff was discharged and claimed the discharge was on account of racial discrimination. Through his union, he pursued the matter to arbitration and lost, while at the same time he was



pursuing his statutory claim under Title VII of the Civil Rights Act of 1964. The district court dismissed plaintiff's case, holding that plaintiff was bound by the arbitration decision and was, thus, precluded from suing his employer under Title VII. That decision was affirmed by the court of appeals. The Supreme Court, however, reversed.

The reasoning of the Court may be briefly abstracted as follows:

While Title VII does not speak expressly to the relationship between federal courts and the arbitration provisions of union contracts, it does vest federal courts with plenary powers to enforce the statutory requirements and it specifies with precision the jurisdictional prerequisites for filing a Title VII case.

415 U.S. at 47.

There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses individuals' rights to sue or divests federal courts of jurisdiction.

415 U. S. at 47.

In addition, legislative enactments in this area have long evinced a general intent

to accord parallel or overlapping remedies against discrimination.

415 U.S. at 47 (naming EEOC, state and local agencies, and the federal courts).

In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a law suit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respective appropriate forums.

415 U.S. at 49-50.

The Court also rejected the arguments now made by the majority, that arbitration is as effective a remedy as is the judgment of a court; that Gilmer has waived his rights under the ADEA; and that access to the state courts under the ADEA is a reason to enforce an exclusive remedy of arbitration and deny access to

the federal courts. Of course, it is at once apparent that access to the state courts would also be denied under the majority decision.

While there are many reasons a remedy by way of arbitration is not as effective as the judgment of a court such as those mentioned in Alexander at pp. 57-58: a different factfinding process; not as complete a record; the usual rules of evidence do not apply; and lack of compulsory process, etc.; one ADEA right mentioned by the district court in this case is sufficient to determine the outcome even if that be necessary. That is the right of trial by jury which is preserved under the ADEA. 29 U.S.C. § 626(c)(2). The suggestion that this right may be waived as a justification for its non-existence in arbitration proceedings is reasoning which I do not follow. Neither do I accept it.

Likewise, the suggestion by the majority that the availability of a remedy in the state courts under the ADEA is a reason to enforce arbitration was rejected by Alexander at p. 47. The Court relied upon the general intent of legislative enactments in the field of

civil rights to accord parallel or overlapping remedies against discrimination and mentioned as parallel remedies in Title VII cases the EEOC, state and local agencies, and the federal courts. The fact that access to the state courts has been provided under the ADEA is no more than another parallel or overlapping remedy, in my opinion.

The Court, in Alexander at pp. 51, et seq., explicitly decided that "there can be no prospective waiver of an employee's rights under Title VII." 415 U.S. at 51. I think this proposition must be held to apply to rights under the ADEA and that there can be no prospective waiver thereof, contrary to the majority holding.

The suggestion the majority makes to the effect that the Federal Arbitration Act requires the enforcement of the arbitration provision in this case, while it did not in Gardner-Denver for the principal reason that it was not considered in Gardner-Denver, also, I think, does not bear scrutiny. With that as a starting point, the majority reasons that "the Court's analysis was not governed by the 'federal policy favoring arbitration'



requiring that "[courts] rigorously enforce agreements to arbitrate."

While it is true that the Federal Arbitration Act was not explicitly mentioned in Alexander, it is doing a disservice to the Court, I think, to imply that it was unaware of a federal policy favoring arbitration. Indeed, Alexander referred to United Steelworkers of America v. Enterprise Wheel and Car Company, 363 U.S. 593 (1960), one of the famous Steelworkers Trilogy which provided explicitly that "a major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 578 (1960). So any public policy reason to enforce arbitration to the exclusion of the consideration of the claim by the federal courts was stronger in Alexander than it is here, being a part of the national labor policy. If that policy was not strong enough in Alexander to require the literal enforcement of an arbitration provision to the exclusion of a statutory right, certainly any policy deferring to

an alternate forum for disputes resolution does not rise so high.

To sum it up, the plaintiff, Gilmer, meets the jurisdictional prerequisites for filing a case under the ADEA. The ADEA does not foreclose his right to sue or divest the federal courts of jurisdiction. Since Alexander holds that a collective bargaining agreement to arbitrate does not displace the federal courts of their jurisdiction in a Title VII case, a private agreement to arbitrate should not be held to displace the federal courts of their jurisdiction under the ADEA.

I would affirm the order appealed from.



## UNITED STATES COURT OF APPEALS

## FOR THE FOURTH CIRCUIT

No. 88-1796

ROBERT D. GILMER

Plaintiff - Appellee

v.

INTERSTATE/JOHNSON LANE CORPORATION,  
formerly known as Interstate Securities  
Corporation

Defendant - Appellant

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On Petition for Rehearing with Suggestion  
for Rehearing In Banc  
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The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

On the question of rehearing before the panel, Judge Widener voted to rehear the case. Judges Wilkinson and Young voted to deny.

In a requested poll of the Court on the suggestion for rehearing in banc, Judges Widener, Hall and Sprouse voted to rehear the case in banc; and Judges

Ervin, Russell, Phillips, Murnaghan, Chapman, Wilkinson and Wilkins voted against in banc rehearing.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson.

For the Court,

JOHN M. GRAECEN  
CLERK

## APPENDIX C

DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF  
NORTH CAROLINA  
Charlotte Division  
C-C-88-0396-M

ROBERT D. GILMER,  
Plaintiff,

versus

INTERSTATE SECURITIES CORPORATION,  
Defendant.

Defendant has filed a motion to compel arbitration and to dismiss the complaint. Plaintiff in his complaint seeks relief in the form of lost wages and benefits, reinstatement and reasonable attorney's fees under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, et seq. (ADEA). After reviewing the record and hearing arguments of counsel, the court finds as follows:

## FINDINGS OF FACT

1. Plaintiff began his employment with defendant on May 18, 1981, as

Manager of Financial Services. Defendant terminated plaintiff's employment on November 13, 1987, at which time he held the position of Senior Vice President, Manager of Mutual Funds.

2. On May 26, 1981, eight days after plaintiff was employed, plaintiff completed and signed a "Uniform Application for Securities Industries Registration or Transfer" (Form U-4) with the American Stock Exchange, National Association of Security Dealers (NASD), and the New York Stock Exchange (NYSE) in the State of North Carolina. Plaintiff had previously passed the NASD and NYSE exams.

3. Paragraph 5 of the uniform application provides:

I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register, as indicated in Question 8.

NYSE Rule 347 provides for the arbitration of "any controversy . . . arising out of the employment or

termination of employment" of a registered securities representative.

4. Neither the uniform application nor the NYSE rules make any reference to claims under Title VII of the Civil Rights Act or the ADEA.

#### CONCLUSIONS OF LAW

1. Title VII, 42 U.S.C. § 20003, et seq., was enacted to prohibit employment discrimination based on "race, color, religion, sex, or national origin" and the ADEA was enacted "to prohibit arbitrary age discrimination in employment." Both statutes express strong federal policy against any kind of discrimination in the work place.

2. Plaintiff seeks equitable relief in the form of reinstatement. The ADEA provides that "a person shall be entitled to a trial by jury on any issue of fact in any such action for recovery of amounts owing by a violation of this Act, regardless of whether equitable relief is sought by any such party in such action." 29 U.S.C. § 626(c)(2).

3. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), a unanimous court held that an employee alleging

violations of Title VII was entitled to trial de novo after his claim was arbitrated unsuccessfully. The Supreme Court reasoned that arbitration procedures were not well suited to the final resolution of rights created by Title VII. This reasoning is applicable to claims under the ADEA.

4. This court is also of the opinion that Congress intended to protect ADEA claimants from the waiver of a judicial forum. Plaintiff is entitled to a jury trial on any factual issues for recovery of damages for violation of ADEA.

Based upon the findings of fact and conclusions of law set forth, defendant's motion to dismiss is hereby DENIED.

IT IS SO ORDERED, this /s/ 17 day of January, 1989.

/s/ JAMES B. McMILLAN  
James B. McMillan  
United States District Judge



JUL 27 1990

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1990

No. 90-18 <sup>2</sup>

ROBERT D. GILMER,

*Petitioner,*

v.

INTERSTATE/JOHNSON LANE CORPORATION,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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*\*Counsel of Record*

No. 90-18

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

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ROBERT D. GILMER,  
Petitioner,

v.

INTERSTATE/JOHNSON LANE  
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Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI  
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RESPONDENT'S BRIEF IN OPPOSITION

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### QUESTIONS PRESENTED

- I. WHERE THE TEXT, LEGISLATIVE HISTORY AND PURPOSES OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) DO NOT DISCLOSE A CONGRESSIONAL INTENT TO FORECLOSE ARBITRATION OF PETITIONER'S AGE CLAIM, DOES THE FEDERAL ARBITRATION ACT REQUIRE ENFORCEMENT OF PETITIONER'S INDIVIDUAL ARBITRATION AGREEMENT?
- II. WHERE PETITIONER VOLUNTARILY AGREES TO ARBITRATE EMPLOYMENT DISPUTES WITH HIS EMPLOYER, IS THE AGREEMENT INVALID AS A PROSPECTIVE WAIVER OF SUBSTANTIVE RIGHTS?



PARTIES AND LIST OF  
AFFILIATED CORPORATIONS

The Respondent is properly identified in the Petition. There are no other affiliated corporations with an interest in this action. Respondent was formerly known as Interstate Securities Corporation.

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No. 90-18

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

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ROBERT D. GILMER,  
  
Petitioner,

v.

INTERSTATE/JOHNSON LANE  
CORPORATION,  
  
Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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#### RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, Interstate/Johnson Lane  
Corporation, respectfully requests that  
this Court deny the Petition for Writ of

Certiorari seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 895 F.2d 195 (4th Cir. 1990), and is fully set out in the Appendix to the Petition at pages 1a-36a.

#### JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

#### STATUTES INVOLVED

The Petition properly identifies each of the statutes involved in this case.

#### STATEMENT OF THE CASE

##### A. Proceedings Below

The Petition correctly sets forth the proceedings before the District Court and the Court of Appeals for the Fourth Circuit.

##### B. Facts

The facts essential for resolution of this Petition are reported in the Petition at page 3-4. However, Petitioner's arbitration agreement was not part of a collective bargaining agreement; rather, it was required for his employment as a securities broker for Respondent.

#### REASONS WHY PETITION FOR WRIT OF

#### CERTIORARI SHOULD BE DENIED

The Petition should be denied for several reasons. The decision below correctly applied this Court's decisions which have continued to expand the Federal Arbitration Act's authorization for arbitration of statutory claims. Rodriguez de Quijas v. Shearson/American Express, Inc., \_\_\_ U.S. \_\_\_, 109 S. Ct. 1917 (1989); Perry v. Thomas, 107 S. Ct.

2520 (1987); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985); Southland Corp. v. Keating, 465 U.S. 1 (1984). The Fourth Circuit also properly balanced the analytical framework required by those decisions against the special protections afforded a claimant under the ADEA and found no reason that the Petitioner's ADEA rights could not adequately be protected in an arbitral forum. In seeking to overcome the proper resolution of this case, the Petition contains several misstatements regarding the Fourth Circuit's decision as well as this Court's precedents. Furthermore, the Petition focuses only

on the results of the Fourth Circuit's analysis, not on the Court's analytical process or application of this Court's controlling decisions under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. Respondent submits that these arguments do not state a valid reason for granting certiorari.

The Fourth Circuit correctly followed the analytical framework required by this Court under the Federal Arbitration Act:

To defeat application of the Arbitration Act . . . , the [party opposing arbitration] must demonstrate that Congress intended to make an exception to the Arbitration Act for claims arising under [a particular statute], an intention discernible from the text, history or purposes of the statute.

Shearson/American Express, Inc. v. McMahon, 107 S. Ct. at 2337-38 (1987)



(emphasis added). The Petition conspicuously does not demonstrate any fault in the Fourth Circuit's analysis of the ADEA under the standards enunciated by this Court in McMahon. The Circuit Court thoroughly analyzed the ADEA's text, its legislative history, and underlying purposes in deciding that Congress had not demonstrated an intention to foreclose arbitration of an individual employee's written agreement to arbitrate employment claims with his employer (App. 7a-23a). Petitioner cannot fault the correctness of the Fourth Circuit's legal analysis; he simply dislikes the result. That dislike, however, provides no basis for granting the Petition.

Petitioner attempts to create an issue for review by mischaracterizing

the Fourth Circuit's decision and the status of this Court's earlier decisions. For example, contrary to the Petition's suggestion, neither the Fourth Circuit nor any other circuit court applying the Federal Arbitration Act has questioned the "continued viability" of Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) or any other decision of this Court. (Petition 7-8) Since Alexander does not control or even address the central issue in this case, any question of its "continued viability" has no significance for resolving this Petition. This argument is a false issue and should not mislead the Court.

The Fourth Circuit found Alexander "inapposite" in applying the Federal Arbitration Act to an individual employee's written agreement to

arbitrate employment disputes.

(App. 24a) The circuit court similarly found that Barrentine v. Arkansas-Best Freight Systems, 450 U.S. 728 (1981) and McDonald v. City of West Branch, 466 U.S. 284 (1984) were inapposite to the facts and legal issue presented in this case. Certainly a lower court can properly determine that another court decision is inapposite to a particular set of facts or legal issue without questioning that decision's "viability".

The Fourth Circuit's determination that Alexander, Barrentine, and McDonald do not control the Federal Arbitration Act question here is clearly correct for several reasons. First, none of these cases required this Court to analyze an arbitration agreement in light of the dictates of the Federal Arbitration Act.

Since that Act was not analyzed or applied in any of these earlier cases, the central question required by the Act was never considered in the earlier decisions. (i.e., identifying a Congressional intent to foreclose enforcement of an arbitration agreement.) Where the earlier decisions did not consider that question, and, specifically, where this Court never considered the particular statute in this case -- the ADEA -- the earlier Supreme Court decisions clearly do not control the issue that was before the Fourth Circuit.

Also, the Petition similarly misstates that:

the Fourth Circuit found that the [Supreme Court's] three [earlier] cases were displaced by Mitsubishi . . . McMahon . . . and Rodriguez de Quijas. . .

(Petition 8) (emphasis added). As already noted, the Fourth Circuit only found that these decisions were "inapposite" (App. 24a) and for several reasons determined that the earlier cases "do not control our decision here." (App. 27a). As shown by the Circuit Court's point-by-point contrast of key factors and facts (App. 23a-27a), Alexander, Barrentine, or McDonald do not alter or conflict with this Court's required analysis prescribed by McMahon and other Supreme Court decisions under the Federal Arbitration Act.

The Fourth Circuit's proper application of the Arbitration Act to this case did not require "displacement" of Alexander or any other decision of this Court. The proper analysis set forth in Mitsubishi and McMahon led the

Circuit Court to the correct result without a conflict with Alexander, Barrentine or McDonald. This illusory argument in the Petition should not misdirect this Court's attention by suggesting that the Fourth Circuit has failed to follow any controlling authority.

Next, the Petitioner misrepresents the decision below by claiming that:

[t]he Fourth Circuit's opinion fails to recognize that Mitsubishi, McMahon, and Rodriguez each involved disputes arising out of a business context.

(Petition 9). The Fourth Circuit directly addressed this point:

We remain sensitive to the fact that the context in which this case arises differs somewhat from the contexts of Mitsubishi, McMahon and Rodriguez. Whereas the statutes in those cases were primarily commercial in focus, the ADEA is a civil rights statute. Moreover, the complainants in those cases were securities customers and



persons injured by antitrust violations, not employees who are allegedly victims of discrimination in the workplace. Although the beneficiaries of statutory protections may vary, the principles of statutory interpretation do not.

(App. 29a-30a) The Petition's misstatement on this point again shows the inadequate justification for granting the Petition.

The Petition also overstates the conflict between circuit courts. (Petition 10) This error becomes more obvious when the Federal Arbitration Act's requirements under McMahon are acknowledged. McMahon requires that a court separately analyze the text, legislative history and purposes of each statute in dispute. For example, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., has never been in dispute in this litigation.

Therefore, circuit court decisions which involved Title VII claims<sup>1</sup> do not present a true conflict with the statutory analysis of the ADEA presented here. Indeed, because Mitsubishi and its progeny require analysis of the specific statute that allegedly conflicts with the Federal Arbitration Act, Petitioner's threshold reliance upon Alexander (Title VII), Barrentine (Fair Labor Standard Act) and McDonald (Civil Rights Act of 1871) must fail, particularly where this Court was not called upon to analyze those statutes under the Federal Arbitration Act as this Court subsequently required in McMahon.

---

<sup>1</sup>Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989) and Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304 (8th Cir. 1988)

The Third Circuit's decision in Nicholson v. CPC Int'l. Inc., 877 F.2d 221 (3d Cir. 1989) reached a different result than did the Fourth Circuit in determining that the Federal Arbitration Act could not mandate arbitration of an ADEA claim. The Fourth Circuit specifically addressed the decision and made clear its rationale for reaching a different result:

We find the reasoning of the majority opinion in Nicholson unpersuasive, and therefore we have respectfully chosen not to follow it. Instead, we are in agreement with Judge Becker's dissent in that case that Congress did not intend to preclude waiver of the judicial forum by ADEA claimants.

Our holding reflects nothing more than the view that courts should not strain to find in statutes what Congress has not put there. We find no congressional intent to preclude waiver of the judicial forum in the text, the legislative history, or the underlying purposes of the ADEA. We recognize that the ADEA embodies without question an important

federal policy in prohibiting age discrimination. So too, however, do the Securities Act of 1933 and the Securities Exchange Act of 1934 represent, inter alia, an important federal policy in protecting investors from fraudulent securities transactions. Likewise the Sherman Act reflects an important federal policy in preventing excessive concentration in relevant markets. Nonetheless, arbitration of claims under these statutes is clearly encouraged. See Mitsubishi, McMahon, and Rodriguez.

Courts cannot determine whether arbitration agreements are to be enforced by making subjective judgments as to the relative importance of various federal statutes. Rather, Congress must provide clear guidance if it wishes federal courts to refrain from enforcing arbitration agreements when violations of a particular statutory right are alleged. Without such affirmative guidance in the ADEA, we are reluctant to set aside a coordinate federal statute such as the Arbitration Act.

(App. 27a-29a) Respondent submits that the Fourth Circuit's reasoning is profoundly correct in light of this

Court's decisions in Mitsubishi, McMahon, and Rodriguez. It is readily apparent that the Fourth Circuit's decision correctly determined that an individual arbitration agreement can be enforced to resolve an ADEA claim when that court's analysis is juxtaposed against this Court's clear holding in Mitsubishi:

By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

473 U.S. at 628. The Nicholson decision patently ignores this point. Respondent therefore submits that the Nicholson court's erroneous analysis should not

provide a basis for review of the present case.

PETITIONER'S WRITTEN ARBITRATION

AGREEMENT WAIVES NO SUBSTANTIVE RIGHTS

The Petition's challenge to the validity of the written arbitration agreement ignores the clear protection provided Petitioner by this Court's interpretation of the Federal Arbitration Act in Mitsubishi. 473 U.S. at 628 (quoted supra, at page 16). Where a party to a written agreement gives up no substantive rights, there is no question of waiver, prospective or otherwise. Further, the court below correctly resolved this question based on clear precedents of this Court. The Fourth Circuit explained:

Gilmer also argues that the arbitration agreement should not be enforced because it constituted a prospective waiver. This plainly



is not is not the law. Prospective waiver of the judicial forum lies at the heart of the FAA, where it is not only permitted but encouraged. In addition, prospective waivers were clearly approved in Mitsubishi, McMahon, and Rodriguez. In all three cases, the Court enforced arbitration agreements which were entered into before the cause of action at issue arose. See Mitsubishi, 473 U.S. at 617-18; McMahon, 107 S. Ct. 15 2335-36; Rodriguez, 109 S. Ct. 15 1918-19. If, however, Gilmer means that prospective waivers must be examined to determine whether they were knowing and voluntary, then this certainly is true. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974). However, Gilmer has never asserted that his waiver was anything other than knowing and voluntary, nor is there anything to lead us to that conclusion.

Our holding is further buttressed by the fact that it is well-established that federal courts need not always be the forum for the resolution of ADEA claims. The grant of concurrent jurisdiction to state and federal courts in the ADEA allows ADEA claimants to bring their claims in state court in the first instance. See Mathis, 680 F. Supp. at 547; Jacoby v. High Point Label, Inc., 442 F. Supp. 518, 520 (M.D.N.C. 1977). Thus, Congress clearly did

not intend that all ADEA disputes be resolved in federal court; rather it contemplated a more flexible scheme for the resolution of individual ADEA claims. In fact, Congress' grant of concurrent jurisdiction over ADEA suits may evince an affirmative intent, apart from that contained in the FAA, to permit waiver of the judicial forum. In Rodriguez, the Court noted that congressional legislation provided for concurrent jurisdiction constituted an "explicit authorization for complainants to waive [federal court procedural] protections by filing suit in state court." 109 S. Ct. at 92 The Court went on to declare that "arbitration agreements, which are 'in effect, a specialized kind of form-selection clause,' should not be prohibited . . . since they like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." Id. at 1921 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974)). The grant of concurrent jurisdiction in the ADEA evidences, if anything, a congressional intent to provide a broad right of forum selection, including the right to elect arbitration.

(App. 19a-21a) In light of this Court's clear holding in Mitsubishi as well as the Fourth Circuit's proper resolution of this question, there is no need for this Court to address this question again.

Finally, Petitioner challenges the lower court's reading of the record evidence. The lower court did determine that the employee "never asserted that his waiver was anything other than knowing and voluntary." (App. 20a) However, Petitioner's argument here as before the court below relies upon argument of his counsel, not the record evidence. Petitioner submitted no evidence before the district court and that court did not find that his agreement was involuntary. (App. 39a-42a) Petitioner never cross

appealed to the circuit court on this point. Indeed, Petitioner's counsel told the trial judge:

"I'm not alleging any fraud or anything."

(See Joint Appendix before the circuit court 43-44.) The Fourth Circuit properly evaluated the record evidence on this point. It was not compelled to substitute argument of Petitioner's counsel for the evidence. Certiorari is not needed where the lower court properly evaluated the record evidence. Also, Petitioner urges this Court to find a lack of consideration for his signing the arbitration agreement. The Fourth Circuit necessarily resolved this argument when it found that:

"As required for his employment, Gilmer registered as a securities representative with the New York Stock Exchange."

(App. 3a) (emphasis added). Although Petitioner's counsel attempted to convince the District Court on this consideration argument (Circuit Court Joint Appendix, pages 20, 41, 43-46), the trial court did not find any lack of consideration. (App. 39a-42a) Petitioner did not cross appeal on this or any point of law or fact. Petitioner's written agreement to arbitrate employment disputes is clearly valid and enforceable as authorized by the Federal Arbitration Act.

CONCLUSION

In light of the foregoing reasons and authorities, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HAYNSWORTH, BALDWIN,  
JOHNSON, AND GREAVES, P.A.

James B. Spears, Jr.\*  
Robert S. Phifer

\*Counsel of Record



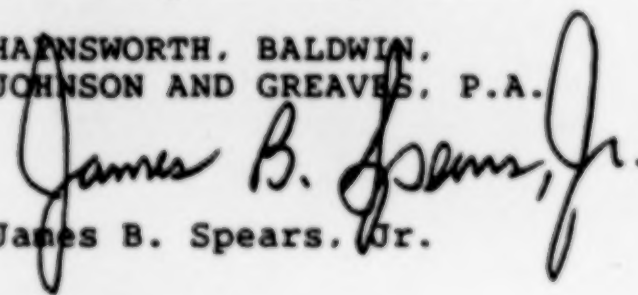
CERTIFICATE OF SERVICE

I, James B. Spears, Jr., do hereby certify that I have this day served a copy of the within and foregoing Repondent's Brief in Opposition to Petition for Certiorari, upon the following person(s), by placing copies of same in the United States Mail, properly addressed and with the correct amount of postage affixed thereto, to the following persons:

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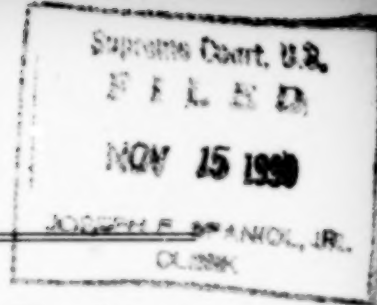
Dated this the 27th day of July, 1990.

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2  
No. 90-18



In The  
**Supreme Court of the United States**

October Term, 1990

---

ROBERT D. GILMER,

*Petitioner,*

v.

INTERSTATE/JOHNSON LANE CORPORATION,

*Respondent.*

---

On Petition For Writ Of Certiorari To The United States  
Court Of Appeals For The Fourth Circuit

---

**JOINT APPENDIX**

---

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**Certiorari was filed on June 26, 1990**  
**Certiorari was granted on October 1, 1990**

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94-186

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DATE	NR.	PROCEEDINGS
1988		
8-29	#1	COMPLAINT
9-27	3	MOTION TO COMPEL ARBITRATION AND TO DISMISS COMPLAINT, by deft.
9-27	4	AFFIDAVIT of GLORIA GIBSON in Support of Defendant's Motion to Compel Arbitration and Motion to Dismiss Complaint
11-04	12	ORDER - JBM - Pursuant ot [sic] a hearing on 11-2-88, the court is of the opinion that the motion to dismiss should be Denied. Cnsl for the pltf will draw & serve upon opposing cnsl & tender findings of fact, conclusions of law & order consistent w/this decision. cc: Attys
11-04	13	AFFIDAVIT OF FRANKLIN C. GOLDEN IN SUPPORT OF DEFTS MOTION TO COMPEL ARBITRATION & MOTION TO DISMISS
11-29	18	NOTICE OF APPEAL by deft. from order denying Deft's Motion to Compel Arbitration and to Dismiss Complaint entered on November 4, 1988. Fil Fee paid R#21225
1/20/89		Motion filed by Appellant Interstate/Johnson for stay pending appeal [1186035-1] [88-1796] (skt)

DATE	NR.	PROCEEDINGS
1988 2/21/89		Court order filed by JDP, JHW, WWW granting motion for stay pending appeal [1186035-1], granting motion to file attachment to motion for stay [1189038-1] Copies to all counsel. [88-1796] (skt)
2/6/90		Published authored opinion filed. [88-1796] (dsd)
2/6/90		Judgment order filed. Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. JHW, Authoring Judge; HEW Dissenting Judge; JHY. [88-1796] (dsd)
2/20/90		Petition filed by Appellee Robert D. Gilmer for rehearing. Number copies filed: 15 [1325469-1], for suggestion for rehearing in banc. Number of copies filed: 15 [1325469-2] [88-1796] (dsd)
3/6/90		Answer [1331296-1] to motion for rehearing [1325469-1], motion for suggestion for reh in banc [1325469-2] filed by Appellant Interstate/Johnson. [88-1796] (dsd)
3/28/90		Court order filed by JHW, HEW, JHY denying motion for rehearing [1325469-1], denying motion for suggestion for reh in banc [1325469-2] Copies to all counsel. [88-1796] (dsd)

DATE	NR.	PROCEEDINGS
1988 <del>7/9/90</del>		Supreme Court notice that petition for certiorari was filed on 06/26/90. Supreme Court No. 90-18. [88-1796] (ch)
7/25/90		COURT ORDER filed granting motion for reconsideration [1379911-1], granting motion to recall the mandate [1374962-1], granting motion to stay mandate [1374962-2] until disposition of e's cert petition Copies to all counsel. [88-1796] (dsd)
10/9/90		Supreme Court order granting certiorari received. Supreme Court no. 90-18 filed in Supreme Court on 10/01/90. [88-1796] (ch)



IN THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF NORTH CAROLINA  
Civil Action No. C-C-88-0396-M

ROBERT D. GILMER,	)	
	)	
Plaintiff,	)	COMPLAINT
	)	(Jury Trial
v.	)	Demanded)
INTERSTATE SECURITIES	)	
CORPORATION,	)	(Filed
	)	Aug. 29, 1988)
Defendant.	)	
_____	)	

Plaintiff, complaining of the defendant says and alleges as follows:

## I.

Plaintiff is a former employee of the defendant Interstate Securities Corporation and brings this action under the Age Discrimination in Employment Act of 1967, as amended, (29 U.S.C. § 621, *et. seq.*, hereinafter referred to as "ADEA") to secure reinstatement and full restitution and payment of all lost wages and benefits resulting from defendant's violation of § 4 of the ADEA (29 U.S.C. § 63) and of § 15(a)(2) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 *et. seq.* as amended, hereinafter referred to as the "FLSA").

## II.

Jurisdiction of this action is conferred upon this court by § 7(c) of the ADEA (29 U.S.C. § 626(c)) and by § 15(b) of the FLSA (29 U.S.C. § 216(b)), which is by § 7(b) of the ADEA (29 U.S.C. § 626(b) made applicable to the powers,

remedies, and procedures to be used in the enforcement of the ADEA.

## III.

The plaintiff is a citizen and resident of Mecklenberg County, North Carolina and was born August 17, 1925.

## IV.

The defendant is a North Carolina corporation with its principal office and place of business in Mecklenberg County, North Carolina.

## V.

The defendant is an employer engaged in industry affecting commerce within the meanings of § 11(b) and (h) of the ADEA (29 U.S.C. § 639(b), (h)).

## VI.

More than 60 days prior to the institution of this action and within 180 days of the plaintiff's unlawful termination on November 13, 1987, the plaintiff notified the Equal Employment Opportunity Commission through the filing of charges of discrimination pursuant to § 7(d) of the ADEA (29 U.S.C. § 626(d)).

## VII.

The plaintiff was terminated on November 13, 1987 from his position as Senior Vice President of defendant.

At the time of his termination, plaintiff was manager of the defendant's Mutual Fund Department.

#### VIII.

The plaintiff devoted to the defendant faithful and exemplary service. At no time did the plaintiff ever receive any disciplinary action and the plaintiff was satisfactorily performing his duties at the time of his termination. The plaintiff received regular promotions and pay increases during his employment with the defendant. The plaintiff was notified of his termination by Bob Adams. Bob Adams told the plaintiff: "You have done a superior job promoting the product line and the department has been very profitable. We have no complaints. You have done the best job of all department heads."

#### IX.

Following the termination of the plaintiff's employment, his duties were reassigned to Carla Griffin who is younger and less qualified than plaintiff. The plaintiff was not given any opportunity for reassignment to other positions within defendant.

#### X.

On November 16, 1987 the defendant sent the message attached hereto as Exhibit A to all branch offices. The statement that plaintiff had left to pursue other interests was contrary to plaintiff's instructions and false. The statement that plaintiff had done a fine job is true. The

statements concerning Carla Griffin and Mike Blair are true.

#### XI.

The plaintiff was terminated because of his age and such action by the defendant was, and continues to be, a clear, deliberate and willful violation of § 4 of the ADEA and § 15(a)(2) of the FLSA in which the defendant discriminated against the plaintiff with respect to his further employment because of his age.

#### XII.

As a direct and proximate result of the aforesaid unlawful, willful and deliberate age discrimination against the plaintiff by the defendant, plaintiff has incurred substantial damages, continuing in nature, including but not limited to, loss of wages, and the loss of fringe benefits which accompanied his position with the defendant, including but not limited to health insurance benefits, life insurance benefits and pension and retirement benefits.

#### XIII.

By reason of defendant's aforesaid unlawful, willful and deliberate age discrimination against the plaintiff, the plaintiff is entitled to recover from the defendant liquidated damages in an amount equal to his actual damages, in addition to his actual damages.

## XIV.

By reason of defendant's unlawful, willful and deliberate age discrimination against the plaintiff, the plaintiff is entitled to recover his reasonable attorneys' fees in accordance with the provisions of § 16(b) of the FLSA (29 U.S.C. § 216(b)) and § 7(b) of the ADEA (29 U.S.C. § 66(b)).

WHEREFORE, the plaintiff prays the court as follows:

1. That the plaintiff be awarded his actual damages, including without limitation, lost wages, together with fringe benefits lost from the time of his unlawful termination until the trial of this action, together with an equal amount as liquidated damages.
2. That the plaintiff be reinstated and awarded his actual damages, including without limitation, lost wages, together with fringe benefits from the time of trial of this action until reinstatement or if the court shall conclude reinstatement inappropriate that the plaintiff be awarded the present value as of the time of trial of future lost wages and benefits.
3. That the plaintiff be awarded his reasonable attorneys' fees.
4. That the cost of this action be taxed against the defendant.
5. That all matters in this case be tried to a jury.
6. For such other and further relief as the court deems just and proper.

This the 22 day of August, 1988.

/s/ John T. Allred  
John T. Allred

/s/ W. R. Loftis, Jr.  
W. R. Loftis, Jr.

Attorneys for Plaintiff.

## OF COUNSEL:

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Charlotte, North Carolina 28202-6001  
Telephone: (704) 372-9110

---

CT 97

DATE:: 11-16-87

ATTN:: ALL BRANCH OFFICES

FROM:: BOB ADAMS

BOB GILMER HAS LEFT THE FIRM TO PURSUE OTHER INTERESTS. WE APPRECIATE THE FINE JOB HE HAS DONE FOR US IN THE PAST AND WISH HIM THE BEST OF LUCK IN THE FUTURE.

CARLA GRIFFIN WILL BE THE DIRECTOR OF MUTUAL FUND MARKETING, REPORTING TO MIKE BLAIR. PLEASE JOIN ME IN CONGRATULATING CARLA ON HER NEW POSITION.

---



IN THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF NORTH CAROLINA

ROBERT D. GILMER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
INTERSTATE SECURITIES	)	Civil Action No.
CORPORATION,	)	C-C-88-0396-M
	)	
Defendant.	)	

---

MOTION TO COMPEL ARBITRATION AND  
TO DISMISS COMPLAINT

(Filed Sept. 27, 1988)

Comes now Defendant in the above-captioned case, by and through its counsel, and files this its Motion to Compel Arbitration and Motion to Dismiss Complaint on the following grounds:

1. In May, 1981, as part of his original employment, Plaintiff signed a securities registration agreement providing that he would "arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register. . . ." (Exhibit A (¶5) attached to Affidavit of Gloria Gibson).
2. Rule 347 of the New York Stock Exchange (NYSE) governs disputes arising out of the employment relationship as follows:

Any controversy between a registered representative and any member or member organization arising out of the employment or termination of

employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

3. The Federal Arbitration Act (9 U.S.C. §§ 1-14) requires a federal court, upon application of one of the parties, to stay the trial of an action and to order arbitration in accordance with the agreement of the parties.
4. On November 13, 1987, Plaintiff was separated from his employment with Defendant, Interstate Securities Corporation. Subsequently, Plaintiff filed suit under the Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. § 621 *et. seq.*), rather than submitting the dispute to arbitration as required in accordance with the terms of his agreement with defendant.
5. Wherefore Defendant hereby moves this Court for an Order directing the following:
  - A. Dismissal of the Complaint with prejudice on the ground that such claims are committed to arbitration pursuant to the written agreement of the parties.
  - B. That the Plaintiff request arbitration of all claims in this matter within a reasonable time, to be established by the Court, in accordance with the agreement of the parties.
  - C. That should the Plaintiff fail to request arbitration of his employment claim within a reasonable time, such failure shall constitute an irrevocable waiver of such claims and bar further proceedings involving such claims in any other forum, including an action before this Court.

D. For such other and further relief as to the Court may seem just and equitable on these premises.

Respectfully submitted this 27th day of September, 1988,

HAYNSWORTH, BALDWIN,  
MILES, JOHNSON,  
GREAVES AND EDWARDS

/s/ James B. Spears, Jr.  
James B. Spears, Jr.

/s/ Robert S. Phifer  
Robert S. Phifer

Gateway Center, Suite 1050  
901 West Trade Street  
Charlotte, North Carolina 28202  
(704) 342-2588

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ROBERT D. GILMER,

Plaintiff,

v.

INTERSTATE SECURITIES  
CORPORATION,

Defendant.

Civil Action  
No. C-C-88-0396-M

AFFIDAVIT OF GLORIA GIBSON IN SUPPORT OF  
DEFENDANT'S MOTION TO COMPEL ARBITRATION  
AND MOTION TO DISMISS COMPLAINT

(Filed Sep. 27, 1988)

PERSONALLY APPEARED before me Ms. Gloria Gibson who upon oath deposes and states as follows:

1. My name is Gloria Gibson and I am employed as Vice President, Director of Personnel, Interstate Securities Corporation in Charlotte, North Carolina. I am familiar with the employment records and registration file of Robert Gilmer, a former employee of Interstate Securities. Mr. Gilmer was employed with Interstate between May 1981 and November 1987 as a Manager of Financial Services and later as Manager of Mutual Funds.

2. Attached as Exhibit A to this affidavit is a copy of Mr. Gilmer's Uniform Application for Securities Industry Registration or Transfer (Form U-4), which was executed by Mr. Gilmer in May 1981. A copy of the application is maintained in the regular course of business by Interstate as part of Mr. Gilmer's registration file. I have compared

the attached copy of the application to the copy maintained by Interstate and it is a true and correct copy.

3. The statements I have made on this page and on the preceding one page are true and correct based on my personal knowledge.

Dated this 27th day of September, 1988.

/s/ Gloria Gibson  
Gloria Gibson

Subscribed and sworn to before me  
this 27th day of September, 1988.

/s/ Kate W. illegible  
Notary Public

My commission expires: 2/10/93.

[SEAL]

---



## EXHIBIT A

1. LAST NAME: Gilmer, F. NAME: Robert, FULL MIDDLE OR (SPECIFY IF NONE): Dickerson, NAME P.A. (N/A) NASAA/NASD CRD NO. (N/A)  
 2. EMPLOYMENT DATE (01/20): 5/18/81, FIRM I.D. NO. (0120): 000431, FIRM NAME: Interstate Securities Corporation, STATE: North Carolina, ZIP: 28280  
 3. FIRM MAIN ADDRESS: 2700 NCNB Plaza, STREET: Charlotte, CITY: Charlotte, STATE: North Carolina, ZIP: 28280  
 4. BRANCH I.D. NO.: 2700 NCNB Plaza, OFFICE OF EMPLOYMENT ADDRESS: 2700 NCNB Plaza, STREET: Charlotte, CITY: Charlotte, STATE: North Carolina, ZIP: 28280  
 5. TO BE REGISTERED WITH THE FOLLOWING: (DESIGNATE 1 - INITIAL REGISTRATION; 2 - TRANSFER OF REGISTRATION)  
 6. NASD: 2, NYSE: 2, OTHER (SPECIFY):  
 7. STATE: AL, AK, AZ, CA, CO, CT, DE, FL, GA, IL, IN, IA, KS, KY, LA, MA, MD, ME, MI, MN, MO, MS, MT, NC, NE, NH, NJ, NM, NY, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, VT, WV, WY, X, EXAM REQUEST  
 8. WILL APPLICANT MAINTAIN REGISTRATION WITH ANOTHER BROKER/DEALER? Y, X, NO  
 9. FIRM I.D. NO.: (0980), NAME OF FIRM(S) (0980):  
 10. TYPE OF APPROVAL REQUESTED: (CHECK ALL APPLICABLE CATEGORIES)  
 11. AGENT OF ISSUER: 1030, ALLIED MEMBER: 1220, APPROVED PERSON (EXCHANGE): 1180, BRANCH OFFICER MANAGER: 1120, DIRECT PARTICIPATION PROGRAMS PRINCIPAL: 1260, DIRECT PARTICIPATION PROGRAMS REPRESENTATIVE: 1080, FINANCIAL AND OPERATIONS PRINCIPAL: 1350, GENERAL SECURITIES PRINCIPAL: 1256, INVESTMENT COMPANY AND VARIABLE CONTRACTS PRODUCTS PRINCIPAL: 1270, INVESTMENT COMPANY AND VARIABLE CONTRACTS PRODUCTS REPRESENTATIVE: 1040, MANAGER OFFICE OF SUPERVISORY JURISDICTION: 1240, MEMBER (EXCHANGE): 1161, MUNICIPAL SECURITIES FINANCIAL AND OPERATIONS PRINCIPAL: 1255, MUNICIPAL SECURITIES PRINCIPAL: 1265, MUNICIPAL SECURITIES REPRESENTATIVE: 1050, OFFICER (TITLE): Senior Vice President, REGISTERED COMMODITY REPRESENTATIVE: 1025, REGISTERED OPTIONS PRINCIPAL: 1290, SOLE PROPRIETOR: 1230, SUPERVISORY ANALYST: 1130, OTHER: 1300  
 12. APPLICANT WILL BE DESIGNATED: (ANSWER ONLY IF APPLICABLE)  
 13. CHIEF FINANCIAL AND OPERATIONS PRINCIPAL: 1340, SENIOR REGISTERED OPTIONS PRINCIPAL: 1360, COMPLIANCE REGISTERED OPTIONS PRINCIPAL: 1370  
 14. HAS APPLICANT EVER PASSED AN EXAMINATION, BEEN GRANTED A WAIVER OR QUALIFIED FOR EXEMPTION FROM AN EXAMINATION FROM ANY AGENCY, JURISDICTION, SELF-REGULATORY ORGANIZATION OR COMMISSION? IF SO, INDICATE BELOW.  
 15. REG-BODY: NASD, NASD, NYSE, NYSE, DATE: 1959, 11/69, 1967, 1970, TYPE OF EXAM: RR - Gen. Secs., Reg'd Principal, BOM, Allied Member  
 16. SIGNATURE OF APPLICANT: Robert Dickerson Gilmer, DATE: 5-26-81, SIGNATURE OF APPROPRIATE SIGNATORY: Harry M. Boyd - Executive Vice President, DATE: 5-26-81  
 17. NASAA/NASD CRD USE ONLY

**PERSONAL HISTORY** If there is information to this page, circle question numbers and fill in the appropriate information.

1. LAST NAME: Gilmer  
2. FIRST NAME: Robert  
3. ADDRESS: 910 Cherokee Road  
4. CITY: Charlotte  
5. STATE: NC  
6. ZIP: 28207  
7. DATE OF BIRTH: 8/17/25  
8. PLACE OF BIRTH: Charlotte, NC  
9. HEIGHT: 5' 11"  
10. WEIGHT: 155  
11. HAIR COLOR: Red  
12. SEX: Male  
13. COLOR OF EYES: Brn  
14. MARITAL STATUS: Married  
15. IDENTIFYING MARKS: None  
16. FULL NAME OF SPOUSE: Closs Jennette  
17. IF MARRIED: Closs Jennette  
18. FATHER'S FULL NAME: James Calhoun Gilmer  
19. MOTHER'S FULL NAME: Mary Dickerson Gilmer  
20. MAIDEN NAME OF SPOUSE: Closs Jennette

**BUSINESS HISTORY** Please fill in for each Educational Institution attended with complete address (Street, City, State, Zip Code).

1. NAME AND ADDRESS OF INSTITUTION (INCLUDE ELEMENTARY SCHOOL):  
2. NAME: Darlington School  
3. ADDRESS: Rome, Georgia  
4. NAME: Davidson College  
5. ADDRESS: Davidson, NC  
6. NAME: \_\_\_\_\_  
7. ADDRESS: \_\_\_\_\_  
8. NAME: \_\_\_\_\_  
9. ADDRESS: \_\_\_\_\_  
10. NAME: \_\_\_\_\_  
11. ADDRESS: \_\_\_\_\_

12. NAME AND COMPLETE ADDRESS OF EMPLOYER:  
13. NAME: Interstate Securities Corporation  
14. ADDRESS: 2700 NCNB Plaza, Charlotte, NC  
15. NAME: Wheat, First Securities  
16. ADDRESS: 707 E. Main Street, Richmond, Virginia  
17. NAME: \_\_\_\_\_  
18. ADDRESS: \_\_\_\_\_  
19. NAME: \_\_\_\_\_  
20. ADDRESS: \_\_\_\_\_  
21. NAME: \_\_\_\_\_  
22. ADDRESS: \_\_\_\_\_  
23. NAME: \_\_\_\_\_  
24. ADDRESS: \_\_\_\_\_  
25. NAME: \_\_\_\_\_  
26. ADDRESS: \_\_\_\_\_  
27. NAME: \_\_\_\_\_  
28. ADDRESS: \_\_\_\_\_  
29. NAME: \_\_\_\_\_  
30. ADDRESS: \_\_\_\_\_

31. ARE YOU CURRENTLY ENGAGED IN ANY OTHER BUSINESS EITHER AS PROPRIETOR, PARTNER, OFFICER, DIRECTOR, TRUSTEE, EMPLOYEE, AGENT OR OTHERWISE? (1500)  
YES ☒ NO ☐ IF YES, EXPLAIN: See attached addendum

**RESIDENTIAL HISTORY** Give all home addresses for the past ten years (other than current address). If necessary continue on separate sheet.

1. ADDRESS: See attached addendum  
2. ADDRESS: 23 Rio Vista Lane  
3. ADDRESS: 21 N. Plum Street  
4. CITY: Richmond  
5. CITY: Richmond  
6. STATE: Virginia  
7. STATE: Virginia  
8. ZIP: 23226  
9. ZIP: 23220  
10. FROM MONTH: 5  
11. FROM YEAR: 73  
12. TO MONTH: 5  
13. TO YEAR: 81  
14. FROM MONTH: 1  
15. FROM YEAR: 71  
16. TO MONTH: 5  
17. TO YEAR: 73  
18. FROM MONTH: \_\_\_\_\_  
19. FROM YEAR: \_\_\_\_\_  
20. TO MONTH: \_\_\_\_\_  
21. TO YEAR: \_\_\_\_\_

I authorize and request any and all of my former employers and any other person to furnish to the agency, jurisdiction or organization with which this application is being filed, or any agent acting on its behalf, any information they may have concerning my credit worthiness, character, ability, business activities, educational background, general reputation, together with, in the case of former employers, a history of my employment by them and the reasons for the termination thereof. Moreover, I hereby release each such employer and each such other person from any and all liability of whatever nature by reason of furnishing such information to the agency, jurisdiction or organization or any agent acting on its behalf.

Further, I recognize that I may be the subject of an investigative consumer report ordered by the agency, jurisdiction, or organization with which this application is being filed, and that I have the right to request complete and accurate disclosure by such agency, jurisdiction, or organization of the nature and scope of the investigation requested.

Robert Dickerson Gilmer  
NAME OF APPLICANT (PRINT OR TYPE)  
5-26-81  
DATE  
Harry M. Boyd - Executive Vice President  
NAME OF APPROPRIATE SIGNATORY (PRINT OR TYPE)  
5-26-81  
DATE  
Rev. 7-19-77 U 1 R 1



	YES	NO
1. Have you ever:		
A. been the subject of a major complaint or legal proceeding?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2720
B. been discharged, or requested or permitted to resign for cause?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2730
C. been refused coverage under a fidelity or surety bond, or has any surety company paid out any funds on your coverage or cancelled such coverage?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2735
D. had a license, permit, certificate, registration or membership denied, suspended, revoked or restricted, or had an application withdrawn for cause?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2550
E. been the subject of any order, judgement, decree or other sanction of a foreign court, foreign exchange, or foreign governmental or regulatory agency?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2560
F. been arrested or indicted for any felony or misdemeanor involving the purchase, sale or delivery of any security or commodity, or arising out of the conduct of the business of a broker, dealer, municipal securities dealer, fiduciary, investment company, investment advisor, underwriter, bank, trust company, insurance company or other financial institution, or involving any crime in which violence or threats of violence against any person, dishonesty, wrongful taking of any property, or any manner of fraud was a factor, or involving conspiracy to commit any of the foregoing?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2830
G. been convicted, or pleaded guilty or nolo contendere to any felony or misdemeanor except minor traffic offenses?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2670
H. been a principal or employee of any firm, corporation or association which, while you were associated with it, was convicted of, or pleaded guilty or nolo contendere to, any felony or misdemeanor?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2690
I. or has any firm, corporation or association of which you have been a principal or officer failed in business, made a compromise with creditors, filed a bankruptcy petition or been declared bankrupt?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2790

	YES	NO
2. While associated in any capacity in the securities, commodities, investment advisory, real estate, banking or insurance industry or any other business have you ever:		
A. been found by the Securities and Exchange Commission or in any jurisdiction to have willfully made or caused to be made any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or omitted to state any material fact, which was required to be stated, in any application for registration or report required to be filed under the Federal securities laws or under the securities law of any jurisdiction, or in any proceeding before the Securities and Exchange Commission or any jurisdiction relating to securities, the conduct of business or registration as a broker, dealer, municipal securities dealer, or investment advisor or associated person thereof?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2880
B. willfully made or caused to be made any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or omitted to state any material fact, which was required to be stated, in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, in any report required to be filed with a self-regulatory organization, or in any proceeding before a self-regulatory organization?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2890
C. had any temporary or permanent injunction or administrative order entered against you or any broker, dealer, investment advisor, municipal securities dealer, bank or commodities firm with which you were associated in any capacity at the time such injunction was entered?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2900
D. been associated in any capacity with any broker, dealer, municipal securities dealer, investment advisor or commodity firm which was suspended, expelled or had its registration denied or revoked by any agency, jurisdiction or organization?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2620
E. been found to be the cause of any action cited in 27D?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2910
F. been associated as an officer, a director, a general partner, or an owner of 10 percentum or more of the voting securities in, or a person who, directly or indirectly, through agreement or otherwise, exercised or had power to exercise a controlling influence over the management or policies of a broker, dealer or municipal securities dealer which had been adjudicated bankrupt or for which a trustee has been appointed pursuant to the Securities Investor Protection Act of 1970?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2760

	YES	NO
3. Are you currently:		
A. the subject of any unsatisfied judgements or liens?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2740
B. associated in any endeavor related directly or indirectly to business or financial activities with any person whom you know, or in the exercise of reasonable care should know, to be subject to a statutory disqualification?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2920
C. the subject of any investigation or proceeding, or have you ever been the subject of discipline or found to have violated or to have aided, abetted, counselled, commanded, induced or procured the violation of any law, rule or regulation by any securities, commodities or banking agency or jurisdiction, any national securities exchange, registered securities association or clearing agency or by any other agency or jurisdiction?	<input type="checkbox"/>	<input checked="" type="checkbox"/> 2702

Robert Dickerson Gilmer

NAME OF APPLICANT (PRINT OR TYPE)

*Harry M. Boyd*

SIGNATURE OF APPLICANT

DATE 5-24-81

NASAA/NASO CRO NO

Harry M. Boyd - Exec. V. P.

NAME OF APPROPRIATE SIGNATORY (PRINT OR TYPE)

*Robert D. Gilmer*

SIGNATURE OF APPROPRIATE SIGNATORY

DATE 5-26-81

APPLICANT'S NAME (TYPE OR PRINT)

Robert D. Gilmer

ATTACH PASSPORT SIZE AND QUALITY PHOTO



15



1. I hereby certify that I have read and understand the foregoing statements and that my responses are true and complete to the best of my knowledge.
2. I hereby apply for registration with the organizations and states indicated in Question 8 and, in consideration of such organizations and states receiving and considering my application, I submit myself to the jurisdiction of such states and organizations and hereby certify that I have read, understand and agree to abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the states and organizations as they are and may be adopted, changed or amended from time to time, and I agree to comply with, be subject to and abide by all such requirements and all rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by such states and organizations, subject to right of appeal as provided by law; and I agree that any decision of such states and organizations as to the results of any examination(s) that I may be required to pass will be accepted by me as final.
3. I further agree that neither the states or organizations nor their officers, employees, and others acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of such states and organizations.
4. I authorize the states and organizations to make available to any employer or prospective employer, or to any federal, state or municipal agency, or any securities or commodities industry self-regulatory organization any information they may have concerning me; and I release the states and organizations, their employees and agents, from any and all liability of whatever nature by reason of furnishing such information.
5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in Question 8.
6. I, the undersigned, for the purpose of complying with the laws of the State(s) I have designated in Item 8 relating to either the registration or sale of securities or commodities, hereby irrevocably appoint the administrator, of each of those State(s), or such other person designated by law, and the successors in such office, my attorney in said State(s) upon whom may be served any notice, process of pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the aforesaid laws of said State(s) and I do hereby consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue within said State(s) by service of process upon said appointee with the same effect as if I was a resident in said State and had lawfully been served with process in said State(s). It is requested that a copy of any notice, process or pleading served hereunder be mailed to me at my residence.

**NOTARIZATION OF APPLICANT'S SIGNATURE**

5-26-81 Harry M. Boyd  
DATE SIGNATURE OF WITNESS  
WITNESS MUST BE ONE OF THE FOLLOWING PLEASE CHECK APPROPRIATE BOX  
☐ PARTNER OF THE FIRM  
☐ OFFICER OF THE CORPORATION  
☒ AUTHORIZED EMPLOYEE

5-26-81 Harry M. Boyd  
DATE SIGNATURE OF APPLICANT  
NASAA-NASD CRO NO. 1111111111

STATE OF North Carolina COUNTY Micklenburg SS  
SUBSCRIBED AND SWORN BEFORE ME THIS 26 DAY OF May A.D. 1981 BY Donald H. Lenzell  
My Commission Expires June 10, 1985  
NOTARY PUBLIC  
COUNTY OF Micklenburg STATE OF N.C.

To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statute(s), constitution(s), rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, jurisdiction or organization which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority which may be required by law. This firm has communicated with all the previous employers of the applicant during the past three years, as set forth below:

EMPLOYER	NAME OF PERSON CONTACTED	POSITION OF PERSON CONTACTED	EMPLOYED		WHEN CONTACTED	
			FROM	TO	DATE	REASON
Wheat First Securities	Norman Hancock	Compliance Officer	1/70	5/81	X	X

In addition, I have taken appropriate steps to verify the statements contained in this application and to inquire into the past record and reputation of the applicant.

Please Do Not  
Write  
In This Area

5-26-81 Harry M. Boyd - Exec. V. P.  
DATE PRINT NAME OF APPROPRIATE SIGNATORY

Harry M. Boyd  
SIGNATURE OF APPLICANT

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

ROBERT D. GILMER	)	
Plaintiff,	)	
-vs-	)	DOCKET NO.
	)	C-C-88-0396-M
INTERSTATE SECURITIES	)	
CORPORATION,	)	NOVEMBER 2, 1988
Defendant.	)	
. . . . .	)	

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JAMES B. MCMILLAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: John T. Allred  
Attorney at Law  
217 North Tryon Street  
Charlotte, North Carolina

For the Defendant: James B. Spears  
Attorney at Law  
Gateway Center  
901 West Trade Street  
Charlotte, North Carolina  
28202

[p. 2] THE COURT: Who is the moving party; the defendant?

MR. SPEARS: Yes, Your Honor. This is a motion to compel arbitration on age discrimination. By way of introduction, I am James Spears and I am accompanied by Randall Johnson, an associate in the firm.

THE COURT: Glad to have you with us.

MR. SPEARS: Your Honor, before I address the Age Discrimination Act under what I feel are the controlling Supreme Court decisions, I think it would be hopefully helpful to the Court's understanding of our position to briefly summarize the history of some significant Supreme Court decisions because I think there has been a change in the Supreme Court of the viability of the Federal Arbitration Act, which is a major point in support of our motion.

THE COURT: It will help me better if you review the facts first.

MR. SPEARS: The facts of our particular case, Your Honor?

THE COURT: I think I know what they are, but I would like to have someone state them who does know something.

MR. SPEARS: Briefly, Your Honor, the plaintiff was a former employee of Interstate Securities. He was a department head for, I think approximately 10 or 11 years. He was separated from employment in November of 1987, [p. 3] approximately a year ago. This past summer or fall, he has brought a civil action under the Age Discrimination Act claiming a violation of that federal statute.

MR. ALLRED: If it please the Court, he was age 62 at the time he was fired.

MR. SPEARS: Yes, Your Honor.

MR. ALLRED: And also from a factual standpoint, he was employed on both salary and commissions, receiving a salary of \$70,000 a year and commissions

added to his compensation. By virtue of his performances last year he had commissions additionally of around \$75,000. So he was earning around \$145,000 the day he was fired. He was replaced by a 28-year old person.

MR. SPEARS: Your Honor, in addition to those facts, at the time he was employed, he executed a form required of all security agents known as a U-4 Form. We have attached that in our motion in which the security agent agrees to arbitrate any disputes regarding his employment under the Arbitration Act and that, of course, raises the issue brought by our motion to compel arbitration.

Your Honor, before I proceed to the summary of the case, do you want any other facts?

THE COURT: Well, I was aware of everything that has been said so far. I'm more interested in the facts right now than I am in the legal discourse. Are there any other [p. 4] facts beyond the ones you and Mr. Allred have stated?

MR. ALLRED: Yes, Your Honor, there's one fact I think is very significant, if I may. Mr. Gilmer was employed on May 18, 1981, and all of the terms of his employment were worked out. After he had been at work for some, oh, eight or ten days, they gave him this form.

THE COURT: What was the date he went to work?

MR. ALLRED: He went to work on May 18, 1981. He signed the form on which they are claiming that he agreed to arbitrate on May 28 and it was a form which asked for - it's just an application form. He was already



employed and, of course, there would be no consideration for the execution of this form. It was one that asked his personal history, his educational history, his business history, his residential history, and then they asked him questions: had he ever been subject to legal proceedings; had he ever been discharged, et cetera, et cetera. And then it has on the back of it that he says that his answers are true, and it's got in fine print that he agreed to arbitrate. But he was already employed at the time he signed that, and he was already a representative and duly licensed to sell securities in North Carolina.

MR. SPEARS: Your Honor, there's no dispute that to obtain his position with the company he had to become registered with the New York Stock Exchange.

MR. ALLRED: Your Honor, he had already been [p. 5] registered and had been for some fifteen, twenty years. He was registered in 1959, and he was replaced by a person who was not licensed by the New York Stock Exchange.

MR. SPEARS: Well, that goes to the merits of the age discrimination claim.

MR. ALLRED: No, you just made the statement that he was required to be licensed. He was replaced by someone who was not licensed, therefore, I'm saying your premise was incorrect.

MR. SPEARS: Well, I stand by my statement. It was required of him to become registered, and the signing of the U-4 Form was in compliance with that to obtain the position he had. Your Honor, with regard to what the defendant considers to be the controlling legal standard,

very briefly, the problem we've got with the plaintiff's position on this motion is that they rely upon cases that are pre-1985, and we think the law changed in 1985 with regard to the arbitrability of purely statutory claims.

With regard to claims that are nonstatutory, the law hasn't experienced any dramatic change, but with regard to purely statutory claims, there is a difference there, Your Honor.

The plaintiff relies upon, and their memorandum discusses three Supreme Court decisions. They discuss *Alexander vs. Gardner-Denver*, a 1974 decision of the high [p. 6] court. *Barrattine v. Arkansas - Best Freight Systems*, a 1981 decision of the Supreme Court, and *McDonald vs. City of West Branch*, a 1984 decision.

Your Honor, the factors in those decisions are as follows:

THE COURT: Now, are you now setting out to tell me what the law was before 1985?

MR. SPEARS: Very briefly, Your Honor.

THE COURT: Tell me what the cases hold without distinguishing them, because I have a notion of the tenor of the cases, but I do not pretend to have read them recently or know what they said. Tell me what the cases you're going to discuss held without distinguishing them from anything further.

MR. SPEARS: I appreciate that. I intended to do that. The *Gardner-Denver* case held that arbitration was not required of a Title VII claim, a race discrimination claim under Title VII of the '64 Civil Rights Act. It did not

enforce arbitration or at least didn't require deference to arbitration in that case, a purely statutory claim.

In the *Barrantine* case -

THE COURT: That was under what statute?

MR. SPEARS: That was under the 1964 Civil Rights Act, Title VII. And the Supreme Court, because of the - refused to allow a preceding arbitration proceeding to be - [p. 7] to resolve the Title VII claim. It held that the individual nevertheless had an independent and non-waivable right to go into Federal Court and proceed under the purely statutory claim. And that was in 1974.

In 1981, in the *Barrantine* decision, a similar holding denying arbitration of a statutory claim under the Fair Labor Standards Act. The Court upheld lower courts, denying arbitration of those statutory claims.

Three years later in 1984, the Supreme Court in *McDonald vs. City of West Branch*, similarly denied arbitration of a statutory claim under the 42 USC Section 1983. So prior to 1985, the Supreme Court decisions on the question of enforcing arbitration of a purely statutory claim were totally consistent and generally supported the proposition that the plaintiffs make here, that they were not arbitrable.

Now, the factors the courts relied upon in those decisions I think are significant, because we respectfully submit that those are not - under current Supreme Court laws - are not the controlling consideration. For example, in each of those Supreme Court decisions, Your Honor, the Court focuses upon the public purpose or the public policy that motivated the legislation itself. For example,

the Civil Rights Act of '64. In the *Gardner-Denver* case, the Supreme Court talked about that. Because of the need to eradicate [p. 8] racial discrimination, that put that Act in conflict with a public policy supporting arbitration and, therefore, it held that arbitration was not required. It was - and that's true for all of these three cases, Your Honor. It was almost a presumption before 1985. You could read the cases to conclude that there was a presumption of nonarbitration in favor of purely statutory claims.

They relied also upon the private Attorney General theory - I think initially recognized under Title VII, but also recognized under these other cases - the need for individual private enforcement of these laws.

A third factor these cases rely upon is the question of the arbitrator's authority to remedy any alleged statutory claim violation as would the Federal Court. In *Gardner-Denver* and these other cases, there's a uniform criticism, not by way of competence, but just by way of authority, that under a collective bargaining agreement, for example, the arbitrator's authority is restricted to what the agreement says it is. And, therefore, they reasoned that the arbitrator could not, for example, give the remedies; for example, attorneys' fees and matters like that, and under the Fair Labor Standards Act may not be able to provide liquidated damages.

The fourth factor that I think is important -

THE COURT: Have you written a memo covering these?

[p. 9] MR. ALLRED: He asked you have you written a memo covering these points.



He submitted, Your Honor, a brief in support of his motion, and he filed a reply to our reply to his motion just day before yesterday, I presume. We received it yesterday morning.

MR. SPEARS: It was filed last Friday, Your Honor. We brought a copy of that over to the Court Monday afternoon, I believe.

THE COURT: Oh, yes. Well, let me see what I have. There's a memorandum.

MR. SPEARS: Your Honor, all the memoranda, or at least the defendant's memoranda, focus on was the current law, and I'm trying to demonstrate to the Court the change in that law. Our memoranda focus on the '85 decisions of *Mitsubishi* and the '87 decision in the *Shearson vs. McMahon* or *McMahon* case.

MR. ALLRED: Your Honor, it might help the Court -

THE COURT: I have been trying another case this week and have not read these memoranda if they are in the file.

MR. ALLRED: It might assist the Court, when Interstate filed -

THE COURT: What I'm seeking to do now is locate the papers. Are they in here?

[p. 10] MR. SPEARS: Your Honor, we have got copies if it would assist the Court.

THE COURT: That one hasn't gotten in the file yet.

MR. SPEARS: Your Honor, I apologize. We brought one over Monday afternoon, but if you have been involved in a trial, I can certainly understand why you haven't had an opportunity to review it.

THE COURT: We have got it now. But your copy has a file date of October 28th.

MR. SPEARS: Yes, we came down and hand-filed that.

MS. RICHARDSON: I have that, Judge McMillan. It did come yesterday.

THE COURT: All right. Now we're ready.

MR. SPEARS: I apologize, Your Honor. I'm sorry. Your Honor, the final point that these pre-1985 decisions based their rejection of arbitration on was an attack upon the competence of arbitrators. Generally, there was a view that arbitrators were not competent to handle statutory claim violations, that that was a special province of Federal Courts. And, Your Honor, those four bases; the attack upon the arbitrator's competence; the question of the arbitrator's authority to give remedies comparable to those under the statutory provisions; the reliance upon the private Attorney General theory; and then basically the importance of a public policy involving any particular statute. Those are the [p. 11] factors that the pre-1985 decisions relied upon in resolving questions of arbitrability.

Your Honor, in 1985, with the *Mitsubishi* case, in fact, I think it was presaged in the *Dean Witter vs. Byrd* opinion in a concurrence of Justice White. In 1985, the Supreme Court issued *Mitsubishi*, which upheld arbitration of



claims involving the Sherman Antitrust Act which, of course, is available for treble damages, attorney's fees, similar provisions that would be available under the Age Act, and *Mitsubishi* is a turning point, Your Honor. It's a turning point in the analysis, the analytical framework that the Supreme Court requires, and I think the framework is simple, but what I want to impress upon the Court if I might is the difference in the focus. Under *Mitsubishi* in 1985 - and this was made even stronger under the 1987 decision of *Shearson vs. McMahon* - the Court shifts the focus from the public policy of a particular statute, it shifts the focus to whether or not - to quote *Shearson* - whether or not the Congress has evidenced an intention to exempt that statutory claim from arbitration. Whether we like to or not, that's what the Supreme Court, I think, says in *Mitsubishi* is that it puts the burden on Congress to reflect - either in the statute or the legislative history or in some inherent conflict between the statute and the Federal Arbitration Act - it puts the burden upon Congress to tell us that this type [p. 12] of claim is exempt from arbitration. And that's the import of the *Mitsubishi* decision, Your Honor. That's the significant turning point that we see in 1985. The focus is no longer upon the public policy of the particular statute.

For example, the public policy of Title VII in the *Gardner-Denver* case. Under *Mitsubishi*, while it doesn't denigrate that public policy, it simply shifts the focus to the question, Did Congress intend and where is it shown that Congress intended to exempt this particular type claim from arbitration?

Now, Your Honor, as I said in the 1987 decision of *Shearson vs. McMahon*, which is a Supreme Court

decision, a relatively recent decision, *Shearson* underscores the *Mitsubishi* and applied the *Mitsubishi* criteria on the question of arbitrability.

Now, Your Honor, the plaintiff's position as shown in the memorandum is they rely upon the pre-'85 decision. They rely on *Gardner-Denver*; they rely on *Barrattine*; they rely on *McMahon*; they rely upon the rationale of those decisions.

THE COURT: Tell me what *Mitsubishi* held.

MR. SPEARS: *Mitsubishi* held -

THE COURT: What was the question presented and what did the Court hold?

MR. SPEARS: The question was whether or not a [p. 13] statutory claim -

THE COURT: What was the question presented? What was the factual issue upon which the legal war was made?

MR. SPEARS: It was *Mitsubishi* versus some manufacturers of the cars and it was involved in the international arena and there was a question whether or not -

THE COURT: What was the dispute?

MR. SPEARS: The dispute was over something having to do with the manufacture of the cars. There was some claim -

THE COURT: Dispute between a manufacturer of part of the car and the assembler and seller of the whole car? Who were the parties to the suit?

MR. SPEARS: I think it had to do with maybe some exclusive rights of one party or another.

THE COURT: Have you not read the case?

MR. SPEARS: Yes, I simply don't recall those facts.

THE COURT: I'm interested in the facts of the case.

MR. ALLRED: It was a contract between Mitsubishi and Chrysler and the contract contained in it a Chrysler -

THE COURT: A straight commercial contract?

MR. ALLRED: That's correct.

[p. 14] THE COURT: Something to do with assembly of automobiles?

MR. ALLRED: That's correct.

THE COURT: Was Chrysler hiring Mitsubishi to make cars for them; is that what it was?

MR. SPEARS: That's what I understand the agreement was. That's the essence of what I understand the agreement was. It was fairly complicated. There was that arbitration clause in the contract.

THE COURT: Was there - did they have a previously executed agreement that might arise under the contract?

MR. SPEARS: That was in the contract.

THE COURT: What did the Court hold?

MR. SPEARS: The Court held that that was enforceable.

THE COURT: They upheld the arbitration?

MR. SPEARS: Yes, they upheld arbitration of a counterclaim.

THE COURT: Was there any act of Congress that would be depleted by a decision that the Court reached?

MR. SPEARS: No, Your Honor.

THE COURT: Was there any public policy or public purpose that was going to be affected by the upholding of the arbitration?

MR. SPEARS: No. For the first time, the Supreme [p. 15] Court said arbitrators can enforce the public policy. That's what's significant about the case.

THE COURT: Well, let me read what they said. Is it in this memorandum? It doesn't surprise me that the Court would uphold a contract. It gives me some pause to think the Court would uphold a general arbitration covenant which would repeal a policy of Congress that has been established for many decades. Is that the question we have here?

MR. SPEARS: No, it's not a commercial contract. What's significant about it -

THE COURT: It's a question of upholding a contract that would defeat the purpose of the discrimination law.

Let me get the facts of *Mitsubishi* in my head.

MR. SPEARS: Your Honor -

THE COURT: The conflict is a controversy between manufacturers and the contractors not raising any questions of a separate policy established by Congress such as against age discrimination and employment.



MR. SPEARS: Let me come to that.

THE COURT: Is that a correct understanding of the case?

MR. SPEARS: No. Let me see if I can clarify it if I might, Your Honor. When Chrysler was sued, they raised as a counterclaim violations of the Sherman Antitrust Act. That's the important public policy comparable to Title VII. [p. 16] And when they raised those counterclaims to defend themselves, *Mitsubishi* says, Well, the arbitration agreement to arbitrate any disputes between us covers that, too. And that's the issue that was before the Supreme Court, whether or not it's purely a statutory claim under the Sherman Act for treble damages was subject to arbitration, not just the commercial aspect of the contract.

THE COURT: How do you state the holding of *Mitsubishi*?

MR. SPEARS: I state the holding of *Mitsubishi* is once a Federal Court analyzes the statutory framework of any particular public statute, then if it concludes that arbitration was not foreclosed by Congress, then the Federal Arbitration Act mandates arbitration of that claim, which is, Your Honor, a total 180-degree change. I would totally agree that that's a dramatic change from what the pre-*Mitsubishi* law was.

THE COURT: How do the parties arrive at the contract in *Mitsubishi*? What is it?

MR. SPEARS: I'm not sure that's reflected in the decision.

THE COURT: Was the contract between people of relatively equal bargaining power?

MR. SPEARS: I would assume so, Your Honor.

THE COURT: Or was it signed by an employee who [p. 17] started to work for an employer, who had already started a week or two before?

MR. SPEARS: No, Your Honor, it was not an employment contract. It was, I would assume, parties of equal bargaining power. And I would think to negotiate an employment contract, I would think the parties in entering that employment contract, I think would be of equal negotiating power. *Mitsubishi* didn't say if somebody raises the Sherman Antitrust Act, we're going to arbitrate that. That's why Chrysler says we're countersuing them for no antitrust violation. The Supreme Court said, That's fine, but show us in the Sherman Act where congressional intent was that Sherman Antitrust claims could not be guaranteed; and they concluded they were not shown.

Your Honor, similarly in the *Shearson* case in - I'm sorry, you want to further discuss *Mitsubishi*?

THE COURT: Go ahead.

MR. SPEARS: Two years later in 1987 in the *Shearson vs. McMahon* case in 1987 -

THE COURT: Who were the parties in that?

MR. SPEARS: The cite is 107 Supreme Court 2332. And, Your Honor, in that case, there were claims involving the Securities and Exchange Act, 16B of the Securities and Exchange Act of 1934, and also the Racketeering Statute commonly known, I think, as Reco Claims. Those



were claims [p. 18] raised by that lawsuit and *Shearson* applying the *Mitsubishi* standard of what was congressional intent, decided that both of those statutory claims, that they compelled arbitration, of both of those purely statutory claims. And, Your Honor, in *Mitsubishi*, we think it's significant because the Court takes on these issues of the arbitrators' competence. It takes on the question of whether or not the arbitrator – whether or not a party by agreeing to arbitration, gives up some of his or her substantive legal rights under the statute and they answer those very clearly. In *Shearson* it says on Page 2339, Your Honor, of the *Shearson* decision, it says, quote, and they are quoting *Mitsubishi* here, "By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute. It only submits to their resolution in an arbitral rather than a judicial form." So whatever rights, I read that statement as saying whatever substantive rights, not only the rights of non-discrimination but whatever rights to compensation, liquidated damages, attorney's fees, the rights still exist and that's a significant – that's 180 degrees from what the Supreme Court said in *Gardner-Denver*.

THE COURT: What does the Court say about *Gardner-Denver* in the *Shearson* case?

MR. SPEARS: Your Honor, in fact, *Shearson* does not even cite *Gardner-Denver*. It doesn't cite *Barrantine*. It [p. 19] doesn't cite *McDonald*.

THE COURT: Don't you reckon they had read them?

MR. SPEARS: I think so, Your Honor.

THE COURT: No evidence they read them, I take it.

MR. SPEARS: I cannot attest to that, Your Honor. In fact, what's significant on that, Your Honor, if you go back to the dissent in *Mitsubishi*, the dissent in *Mitsubishi* did discuss those three cases and espoused the pre-1985 arguments for not requiring arbitration of statutory claims. But, Your Honor, that was the dissent. I have learned a lot in my law practice. I think I can understand court decisions better by reading the dissent sometimes than I can the majority, and I think by being in the dissent, the discussion of *Gardner-Denver* and *Barrantine*, that dissent demonstrates the change in the law to me.

In fact, when you get to the *Shearson* case, those cases are no longer discussed. In fact, the dissent in *Shearson* – and there was a dissent; there was a dissent on the Securities Act question – but it did not base its dissent upon those three cases. It based it basically on a case *Wilco* [sic] *vs. Swan*, a 1953 decision. And the dissent relied solely upon that case saying we have already basically decided this question. It did not use *Gardner-Denver*. It did not use *Barantine*. It did not use *McDonald*.

Now, Your Honor, with all due respect to those [p. 20] decisions, they may be still be reliable, but I don't see the Supreme Court talking about those.

Your Honor, in a subsequent case we've cited to the Court, a very recent Eighth Circuit opinion, *Sulit vs. Dean Witter Reynolds*, another securities industry case. Your Honor, in *Sulit*, it applied the *Shearson* standard, which is a new standard. In deciding whether or not ERISA claims, an ERISA claim to benefits, whether or not a prior agreement to arbitrate dispute claims required arbitration. ERISA, which as the Court knows, is in the federal

jurisdiction in the Federal Court. The Eighth Circuit in a well-reasoned decision, not only because it supports our position, but I think it analyzes the congressional intent matter, and it concludes that arbitration, that a prior arbitration agreement is enforceable and it mandated arbitration of those claims. That cite, Your Honor, is 847 F.2nd, 475.

THE COURT: It's on page 6 of your memorandum.

MR. SPEARS: Yes, Your Honor. And I've got an extra copy of the case for the convenience of the Court.

(Said document handed to the Court.)

MR. SPEARS: Now, Your Honor, I don't fault the plaintiffs here for arguing *Gardner-Denver* and arguing *Barrantine* and arguing *McDonald*, because that's what the federal district judge in the *Steck* case in New Jersey, that's what that judge relied upon. But, Your Honor, that [p. 21] judge's decision came out a month before the *Shearson* case came out and with all due respect to the judge in New Jersey, we think he misapplied - he couldn't misapply *Shearson*, it didn't exist yet, but we do think he did misapply *Mitsubishi*. The *Steck* case, just like the case before this Court, was an age discrimination case. And the *Steck* case, just as the plaintiffs do here, rely upon *Gardner-Denver*, *Barrantine* and *McDonald*, those pre-1985 cases. We think their reliance is simply misplaced. We think the law has changed and we don't see - if ERISA claims - under the *Sulit* case, can be subject to arbitration, then we think age discrimination claims can be subject to arbitration. Primarily, Your Honor, because in looking at the text of the Act, in looking at the legislative history, in looking at even the purpose of the Act, we

see no congressional intent, and this is what we think *Mitsubishi* requires. We see no congressional intent that says affirmatively, Age Act claims are exempt from arbitration.

Now, Your Honor, the Congress can change that at any time and they may want to, but I think the Supreme Court's current view since *Mitsubishi* is that until they do it, until they demonstrate or unless it already exists in the prior legislature, but until Congress says, you cannot arbitrate this type of claim, until Congress puts it on a vaulted status, I think the Supreme Court has already spoken [p. 22] and says the federal arbitration act mandates arbitration. And, Your Honor, *Shearson* says - we aren't arguing this because we happen to be opponents - but *Shearson* says, the burden of showing that congressional intent is upon the party opposing arbitration.

Your Honor, I would focus the Court's analysis in the *Shearson* case to what the Supreme Court has said about the arbitrator, and it's not just talking about the arbitrators in collective bargaining contracts, but arbitration panels, generally. It says, there's no reason to assume that arbitrators are not competent to handle statutory claims. There's no reason to assume that. They also say there's no reason to believe that an arbitrator can't give the remedy that's available under the statute. I haven't seen that clearly, but I think that's what the Supreme Court is saying. I think under the Sherman Act, if an arbitrator - like the *Mitsubishi* case - If the arbitrator awarded treble damages and costs, which I believe are available under the Sherman Antitrust Act, I think that would be enforceable. I think that arbitrator's decision would be upheld in



court. I think that would be upheld in the light of *Mitsubishi*.

I think the Supreme Court is giving – they're endorsing the arbitration procedure and telling, I think, this country that they want – if you enter into an agreement to arbitrate your disputes, unless there's some congressional [p. 23] intent that you can't do it, then we're going to let you do it.

Your Honor, finally, I have got a question, at least as to in the *Gardner-Denver* cases and some other cases, if they challenge whether or not an arbitrator can give the same type of procedural safeguards that are available in the Federal Courts, Your Honor. We've got – we've copied for the Court and, in fact, I will give the Court a copy of the New York Exchange Rules, Defendant's Exhibit B.

MR. ALLRED: Would you give me a copy of the New York Exchange Rules, too?

MR. SPEARS: Yes, I'll be glad to. Your Honor, these are the arbitration rules. These are comparable, in our view, to the Federal Procedure Rules. Certainly, they may not be as great in certain aspects, but we have highlighted the parts we think are comparable that an arbitrator in a collective bargaining contract would not have. For example, prehearing discovery. These rules provide that the arbitrator can require exchange of documents before the hearing, which is generally not available in collective bargaining arbitrations. In addition to that, compulsory attendance. They can issue subpoenas and the other similar things that I think while maybe not as extensive as the

Federal Civil Procedure Rules, we think negate any argument that the operable procedure in the [p. 24] securities industry is somehow notable to handle statutory claims.

Your Honor, that's our position. Thank you.

THE COURT: There's no form of litigation I would more gladly forego than employment discrimination suits.

MR. ALLRED: Well, Your Honor, I'll not demand equal time; otherwise, we would take the entire morning.

MR. SPEARS: I apologize, Your Honor.

MR. ALLRED: I would like to just make several brief comments. One, I attended the Defense Research Institute on Employment Law two weeks ago and there was a program presented on arbitrations and the opening statement was that the Federal Courts are now looking more favorably upon arbitration except in employment discrimination cases and that comes from the Indian's camp. I would like to say that Your Honor astutely observed that *Gardner-Davis* has not been reversed. It was a unanimous decision of the Supreme Court, and it said there that because of the overriding principles of Congress in trying to eliminate discrimination, that although arbitration had been had in that case earlier, obviously a stay had not been made, it said that the plaintiff was entitled to a trial *de novo*, and as a consequence, the arbitration, of course, was just very highly wasteful, and I think that implicit in the defense response here is that they want to arbitrate. They want to do [p. 25] anything they can to prevent Mr. Gilmer or any person who claims to have been discriminated against from having his day in court.



Even looking at it from the premise stated by Interstate and relying on *Mitsubishi*, which I suggest is not controlling, but if you look at it, I mean does not reverse obviously *Gardner-Davis*, but if you even apply the *Mitsubishi* standard, you still have no arbitration here. It fails on the first premise. Well, the first premise is that *Gardner-Davis* was overruled. It's not been overruled and to be sure if the Supreme Court was going to overrule a unanimous decision, it would indeed do so and let the world know.

Second, the premise of *Mitsubishi* is that the parties agreed there is not a bit of evidence before this Court that the parties agreed. What is before the Court is that eight days after Mr. Gilmer was employed in all terms, he filled out an application, a standard application, which is attached and really was an application form that was just done to complete the files. And the second premise of *Mitsubishi* is that Congress did not intend for there to be arbitration. And I think if you look at the Age Discrimination Act, it says that its purpose is to promote the employment of older persons and to prohibit age discrimination and when you look at that, it prescribes a procedure for anyone who has been discriminated against or [p. 26] who believes he or she has been discriminated against, must file a charge with the EEOC and that's the agency which is to apply any sort of conciliation and that is the agency which is charged, at least by Congress, of having expertise.

It seems clear to me that under no circumstances is there anything in the Age Discrimination Act from which you could find that Congress intended that parties who had been discriminated against, either by age or by sex or

by race, would have to go to arbitration. We know what defense lawyers do in many cases. Some lawyers are noted for delaying and we know that justice delayed, of course, is justice denied. If the Court were to dismiss this and order arbitration, then under the *Gardner-Davis*, we would be back in Court at some later time and if you will remember old Judge Farthing, he used to say the law does not require a vain thing, and I think if arbitration were ordered here, Your Honor, it would be a vain thing. And I'm aware of this Court's faith in the jury system, and Mr. Gilmer would like his case tried by the jury, and I would ask that you deny their motion.

MR. SPEARS: Your Honor, may I make just one comment? There's no claim at this time that the company either misrepresented or defrauded the plaintiff into signing that U-4 Form and that's an issue discussed in *Mitsubishi* and the other cases. If there's some – under some contractual [p. 27] basis – a reason that a contract claim, such as misrepresentation [sic] or fraud, shouldn't be enforced, well, that's certainly available. There's just no claim of that here, Your Honor, and that puts to bed any argument that this thing was not an agreement or shouldn't be enforced as an agreement. That's what the Federal Arbitration Act does and it says so in *Mitsubishi*, that it puts parties' agreements upon a higher plane, if you will, and says we'll enforce them if that's the agreement, unless there's some fraud or misrepresentation that would authorize any party to get out of the contract, and there's no claim to that here, Your Honor.

MR. ALLRED: I will make two short responses to that, Your Honor. Contracts require consideration. Mr.

Gilmer was already employed. There was no consideration for what purports to be an agreement, and if the Court will look at what's attached to Ms. Gloria Gibson's affidavit, you will not see anything in there in the nature of an employment agreement. Nothing in there with regard to duties; nothing in there with regard to compensation. And I would remind the Court of what I'm sure the Court is well aware of in these employment covenants not to compete cases, anytime an employee is employed by an employer and then five days later someone comes in and says, sign this covenant not to compete, the courts uniformly throw that out. I'm not alleging any [p. 28] fraud or anything. I'm saying there was absolutely no consideration for that and he falls on his first premise.

THE COURT: Do you cite those cases on that point in your brief?

MR. ALLRED: On the covenant not to compete? I'm not sure. We cited a couple of cases -

THE COURT: You said all the courts had decided in your favor. Do you cite any of those cases?

MR. ALLRED: We cited cases on the consideration aspect; whether they were covenant not to compete cases, I'm not sure. I did not write the memorandum, but I will be happy to submit those cases to you.

THE COURT: Well, you made a strong statement and I was just checking to see -

MR. ALLRED: I was also -

THE COURT: Let me see the memorandum you say supports that. When was it filed?

MR. ALLRED: Ours was filed on -

THE COURT: October 12th?

MR. ALLRED: My copy doesn't have a stamp on it.

THE COURT: Was it entitled Plaintiff's Memorandum in Opposition?

MR. ALLRED: Yes, sir.

THE COURT: What are some cases that deal with consideration, a contract signed after the employment [p. 29] contract had been established?

MR. ALLRED: Let me find that.

THE COURT: You cite the one North Carolina case.

MR. ALLRED: Yes, sir, you're finding it faster than I am.

THE COURT: On Page 6.

MR. ALLRED: Yes, sir, that's correct. Whether that - we cite *Investment Properties*. We cite two, *Investment Properties vs. Norburn* and *Green vs. Kelly* in that paragraph.

THE COURT: That's a general statement that in order for a contract to be enforceable, it must be afforded by consideration. I guess the other case, *Green*, is the unanimous weight of authority that you're referring to?

MR. ALLRED: That's correct, Your Honor. I felt like that was such a well-established principle in your covenant not to compete cases that they uniformly -

THE COURT: What about the fact that he worked for several years under the agreement?



MR. ALLRED: Well, he had indeed worked for several years. Now, whether that's - I still contend that was not an agreement. It was just a routine form and, furthermore, the arbitration provision that they are trying to enforce was Rule 347 of the New York Exchange Rule and the appendix attached to one of their briefs shows there were three [p. 30] volumes and I submit that in the bargaining process between an employer and employee, it's really hard to say that Mr. Gilmer really knew what was in this book when he signed that eight days after he was employed.

MR. SPEARS: Your Honor, the plaintiff's counsel has pointed out he was already registered as an [sic] securities agent. He's had quite a career in that industry. While no one person can be said to know everything in the book -

THE COURT: Judges are the only persons that know everything involved with law.

MR. SPEARS: With the exception of judges, Your Honor. I would say we all suffer under that, but I don't think that's dispositive. And, Your Honor, I would remind the Court under the *Steck* case, the case they rely upon, that the Court found, the New Jersey court found that that agreement, the same U-4 Form that was required there, brought the *Mitsubishi* requirement that they had an agreement that the Federal Arbitration Act would apply to. It was - part of being a registered agent was obviously a part of being his job, and I don't see any affidavit saying it wasn't, Your Honor.

MR. ALLRED: Well, I'll only respond to that, Your Honor, by saying he was replaced by someone who was not a registered agent; and, two, with respect to his being

a registered agent with the New York Stock Exchange over the [p. 31] years, that shows that that has nothing whatsoever to do with his employment contract at the time he went to work for Interstate because that was something that just existed with regard to his other employment. And the whole point of it is, though, I think the Court is well aware, that Congress in its wisdom was trying to correct some very horrible wrongs with Title VII and the Age Discrimination Act, and it provided the forum to resolve those disputes, and that is the Federal Court. And it seems to me that from the very stringent forceful arguments made by Interstate here, it's very obvious that they don't want Mr. Gilmer to have his day in court.

MR. SPEARS: We want him to have his day in arbitration, Your Honor.

THE COURT: Anything further from either side?

MR. SPEARS: Not from the defendant, Your Honor.

MR. ALLRED: No, Your Honor.

THE COURT: Okay. I guess I've got some studying to do. I thank you both for getting on point and staying on the point all the way through.

(END OF PROCEEDINGS)

\* \* \*

#### CERTIFICATE

I, BARBARA K. PETERSON, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matters.



/s/ Barbara K. Petersen  
 BARBARA K. PETERSON  
 OFFICIAL COURT REPORTER

3/6/89

DATE

IN THE UNITED STATES DISTRICT COURT  
 FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ROBERT D. GILMER,

Plaintiff,

v.

INTERSTATE SECURITIES  
 CORPORATION,

Defendant.

Civil Action  
 No. C-C-88-0396-M

DEFENDANT'S MOTION TO COMPEL ARBITRATION  
 AND TO DISMISS COMPLAINT

Defendant's Exhibit B

New York Stock Exchange, Inc.  
 Constitution and Rules

NEW YORK STOCK EXCHANGE, INC.  
 ARBITRATION

... rules of Board of Directors administered  
 through the facilities of the Exchange  
 prescribing the procedure to be used  
 in arbitration ...

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Arbitration Rules  
(Rules and Policies Administered by the  
Office of the Secretary.)

¶ 2600

Arbitration

Rule 600. (a) Any dispute, claim or controversy between a customer or non-member and a member, allied member, member organization and/or associated person arising in connection with the business of such member, allied member, member organization and/or associated person in connection with his activities as an associated person shall be arbitrated under the Constitution and Rules of the New York Stock Exchange, Inc. as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member.

(b) Under this Code, the New York Stock Exchange, Inc. shall have the right to decline the use of its arbitration facilities in any dispute, claim or controversy, where – having due regard for the purposes of the New York Stock Exchange, Inc. and the intent of this Code – such dispute, claim or controversy is not a proper subject matter for arbitration.

¶ 2601

## Simplified Arbitration

Rule 601. (a) Any dispute, claim or controversy, arising between a public customer(s) and an associated person or a member subject to arbitration under this code involving a dollar amount not exceeding \$5,000, exclusive of attendant costs and interest, shall upon demand of the customer(s) or by written consent of the parties, be arbitrated as herein after provided.

(b) The Claimant shall file with the Director of Arbitration one (1) executed Submission Agreement and one (1) copy of the Statement of Claim of the controversy in dispute, together with documents in support of the claim. The Statement of Claim shall specify the relevant facts, the remedies sought and whether or not a hearing is demanded.

(c) The Claimant shall pay the sum of \$15.00 if the amount in controversy is \$1,000 or less, \$25.00 if the amount is more than \$1,000 but \$2,500 or less, or \$100 if the amount in controversy is more than \$2,500, but does not exceed \$5,000 upon filing of the Submission Agreement. The final disposition of this sum shall be determined by the arbitrator.

(d) The Director of Arbitration shall endeavor to serve promptly, by mail or otherwise, on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim. The Respondent(s) shall, within twenty (20) calendar days from receipt of service, file with the Director of Arbitration one (1) executed Submission Agreement and one (1) copy of

the Respondent's answer, together with supporting documents. The Answer shall designate all available defenses to the Claim and may set forth any related Counterclaim and/or related Third Party Claim the Respondent(s) may have against the Claimant or any other person. If the Respondent(s) has interposed a Third Party Claim, the Director of Arbitration [sic] shall endeavor to serve promptly by mail or otherwise a copy of same, together with a copy of the Submission Agreement on such Third Party who shall respond in the manner herein provided for response to the Claim. If the Respondent(s) files a related Counterclaim [sic] exceeding \$5,000, the arbitrator may refer the claim, counterclaim and/or Third Party Claim, if any, to a panel of three (3) or five (5) arbitrators in accordance with Rule 607 or, he may dismiss the Counterclaim, and/or Third Party Claim without prejudice to the Counterclaimant(s) and/or Third Party Claimant(s) pursuing the counterclaim and/or Third Party Claim in a separate proceeding.

(e) The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Claimant a copy of the Answer, Counterclaim, Third Party Claim or other responsive pleading, if any. The Claimant, if a Counterclaim is asserted against him, shall within ten (10) calendar days either (i) file a Reply to any Counterclaim with the Director of Arbitration who will serve a copy of the Reply on the Respondent(s) or, (ii) if the amount of the Counterclaim exceeds the Claim, have the right to file a statement withdrawing the Claim. If the Claimant withdraws the Claim, the proceedings will be discontinued without prejudice to the rights of the parties.



(f) The dispute, claim or controversy shall be submitted to a single arbitrator knowledgeable in the securities industry selected by the Director of Arbitration. Unless the public customer demands or consents to a hearing, or the arbitrator(s) calls a hearing, the arbitrator shall decide the dispute, claim or controversy solely upon, the pleadings and evidence filed by the parties. If a hearing is necessary, such hearing shall be held as soon as practicable at a locale selected by the Director of Arbitration.

(g) The Director of Arbitration may grant extensions of time to file any pleading upon a showing of good cause.

(h) The arbitrator shall be authorized to require the submission of further documentary evidence as he, in his sole discretion, deems advisable.

(i) Upon the request of the arbitrator, the Director of Arbitration shall appoint two (2) additional arbitrators to the panel which shall decide the matter in controversy.

(j) In any case where there is more than one (1) arbitrator, the majority will be public arbitrators.

(k) In his discretion, the arbitrator may, at the request of any party, permit such party to submit additional documentation relating to the pleadings.

(l) Except as otherwise provided herein, the general arbitration rules of the New York Stock Exchange, Inc. shall be applicable to proceedings instituted under this Code.

Amendment.

December 6, 1984.

#### ¶ 2602

##### Hearing Requirements - Waiver of Hearing

Rule 602. (a) Any dispute, claim or controversy, except as provided in Section 2 (Simplified Arbitration), shall require a hearing unless all parties waive such hearing in writing and request that the matter be resolved solely upon the pleadings and documentary evidence.

(b) Notwithstanding a written waiver of a hearing by the parties, a majority of the arbitrators may call for and conduct a hearing. In addition, any arbitrator may request the submission of further evidence.

#### ¶ 2603

##### Time Limitation Upon Submission

Rule 603. No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years shall have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

Amendment.

December 6, 1984.

## ¶ 2604

## Dismissal of Proceedings

Rule 604. At any time during the course of an arbitration, the arbitrators may either upon their own initiative or at the request of a party, dismiss the proceeding and refer the parties to the remedies provided by law. The arbitrators shall upon the joint request of the parties dismiss the proceedings.

## ¶ 2605

## Settlements

Rule 605. All settlements upon any matter submitted shall be at the election of the parties.

## ¶ 2606

Tolling of Time Limitation(s) for the  
Institution of Legal Proceedings  
and Extension of Time Limitation(s)  
for Submission to Arbitration

Rule 606. (a) Where permitted by law, the time limitation(s) which would otherwise run or accrue for the institution of legal proceedings, shall be tolled when a duly executed Submission Agreement is filed by the claimant(s). The tolling shall continue for such period as the New York Stock Exchange, Inc. shall retain jurisdiction upon the matter submitted.

(b) The six (6)-year time limitation upon submission to arbitration shall not apply when the parties have submitted the dispute, claim or controversy to a court of competent jurisdiction. The six (6)-year time limitation

shall not run for such period as the court shall retain jurisdiction upon the matter submitted.

## Amendment.

December 6, 1984.

## ¶ 2607

## Designation of Number of Arbitrators

## Rule 607. (a) Public Controversies

(1) Except as otherwise provided in this Code in all arbitrations involving public customers and other non-members where the matter in controversy does not exceed the amount of \$500,000, or where the matter in controversy does not involve or disclose a money claim, the Arbitration Director shall appoint an arbitration panel which shall consist of no less than three (3) nor more than five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

(2) In all arbitration matters involving public customers and other nonmembers where the amount in controversy is \$500,000 or more, the Director of Arbitration shall appoint an arbitration panel which shall consist of five (5) arbitrators unless the parties agree in writing to a panel of three (3) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

## (b) Composition of Panels

The individuals who shall serve on a particular arbitration panel shall be determined by the Director of Arbitration. The Director of Arbitration may name the chairman of each panel.

Amended.

June 18, 1986.

#### ¶ 2608

##### Notice of Selection of Arbitrators

Rule 608. The Director of Arbitration shall inform the parties of the names and business affiliations of the arbitrators at least eight (8) business days prior to the date fixed for the initial hearing session.

#### ¶ 2609

##### Peremptory Challenge

Rule 609. In any arbitration proceeding, each party shall have the right to one peremptory challenge. In arbitrations where there are multiple claimants, respondents and/or third party respondents, the claimants shall have one peremptory challenge, the respondents shall have one peremptory challenge and the third party respondents shall have one peremptory challenge, unless the Director of Arbitration determines that the interests of justice would best be served by awarding additional peremptory challenges. Unless extended by the Director of Arbitration, a party wishing to exercise a peremptory

challenge must do so by notifying the Director of Arbitration in writing within five (5) business days of notification of the identity of the persons named to the panel. There shall be unlimited challenges for cause.

Amendment.

December 6, 1984.

#### ¶ 2610

##### Disclosures Required of Arbitrators

Rule 610. Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Prior to the commencement of the first hearing session the Director of Arbitration may remove an arbitrator who discloses such information. The Director of Arbitration shall also inform the parties of any information disclosed pursuant to this section, if the arbitrator who disclosed the information is not removed.

#### ¶ 2611

##### Disqualification or Other Disability of Arbitrators

Rule 611. In the event that any arbitrator, after the commencement of the first session but prior to the rendition of the award should become disqualified, resign, die, refuse or be unable to perform or discharge his duties, the Director of Arbitration, upon such proof as he deems satisfactory, shall, where permitted by law, either (a) appoint a new member to the panel to replace such



arbitrator, obtaining the consent of the parties; or (b) with the consent or waiver of the parties, direct that the arbitration proceed without the substitution of a new arbitrator.

## ¶ 2612

### Initiation of Proceedings

Rule 612. Except as otherwise provided herein, an arbitration proceeding under this Code shall be instituted as follows:

#### (a) Statement of Claim.

The Claimant shall file with the Director of Arbitration three (3) executed copies of the Submission Agreement and three (3) copies of the Statement of Claim of the controversy in dispute, together with the documents in support of the claim. The Statement of Claim should specify the relevant facts and the remedies sought. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim.

#### (b) Answer, Defenses, Counterclaims and/or Cross-Claims

(1) The Respondent(s) shall within twenty (20) business days from receipt of service file with the Director of Arbitration one (1) executed Submission Agreement and one (1) copy of the Respondents(s') Answer. The Answer shall specify all available defenses and the relevant facts that will be relied upon at hearing and may set forth any related Counterclaim the Respondent(s) may have against

the Claimant and any third party claim against any other party or person upon any existing dispute, claim or controversy to arbitration under this Code.

(2)(i) A Respondent, Responding Claimant, Cross-Claimant or Third Party Respondent who pleads only a general denial as an answer may upon written objection by the adversary party before the hearing to the Director of Arbitration, in the discretion of the arbitrators, be barred from presenting any facts or defenses at the time of the hearing.

(ii) A Respondent, Responding Claimant, Cross-Claimant or Third Party Respondent who fails to specify all available defenses and relevant facts in such party's answer, may, upon objection by the adversary party, in the discretion of the arbitrators, be barred from presenting such facts or defenses at the hearing.

(iii) A Respondent, Responding Claimant, Cross-Claimant or Third-Party Respondent who fails to file an answer within twenty (20) business days from receipt of service, or unless the time to answer has been extended pursuant to paragraph (5), may, in the discretion of the arbitrators, be barred from presenting any matter, arguments or defenses at the hearing.

(3) If the Respondent(s) has interposed a third-party claim, the Director of Arbitration shall endeavor to serve promptly by mail or otherwise a copy of same together with a copy of the Submission Agreement on such third party who shall respond in the manner provided for response to the Claim.

(4) The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Claimant a copy of the Answer, Counterclaim, Third-Party Claim or other responsive pleading, if any. The Claimant may within ten (10) business days file a Reply to the Counterclaim with the Director of Arbitration who will serve a copy of the Reply on the Respondent(s)

(5) The time period to file any pleading, whether such be denominated as a Claim, Answer Counterclaim, Reply or Third-Party pleading, may be extended for such further periods as may be granted by the Director of Arbitration.

(c) Joining and Consolidation – Multiple Parties

(1) With respect to any dispute, claim or controversy submitted to arbitration, any party or person eligible to submit a claim under this Code shall have the right to proceed in the same arbitration against any other party or person upon any claim directly related to such dispute.

(2) For purposes of this subsection, the Director of Arbitration shall be authorized to determine preliminarily whether a claim is directly related to the matter in dispute and to join any other party to the dispute and to consolidate the matter for hearing and award purposes. In arbitrations where there are multiple claimants, respondents and/or third party respondents, the Director of Arbitration shall be authorized to determine preliminarily whether such parties should proceed in the same or separate arbitrations.

(3) All final determinations with respect to joining, consolidation and multiple parties under this subsection shall be made by the arbitration panel.

Amendments.

December 6, 1984.

June 18, 1986.

¶ 2613

Designation of Time and Place of Hearings

Rule 613. Unless the law directs otherwise, the time and place for the initial hearing shall be determined by the Director of Arbitration and each hearing thereafter by the arbitrators. Notice of the time and place for the initial hearing shall be given at least eight (8) business days prior to the date fixed for the hearing by personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent waive the notice provisions under this section. Notice for each hearing thereafter, shall be given as the arbitrators may determine. Attendance at a hearing waives notice thereof.

¶ 2614

Representation by Counsel

Rule 614. All parties shall have the right to representation by counsel at any stage of the proceedings.

## ¶ 2615

## Attendance at Hearings

Rule 615. The attendance or presence of all persons at hearings including witnesses shall be determined by the arbitrators. However, all parties to the arbitration and their counsel shall be entitled to attend all hearings.

## ¶ 2616

## Failure to Appear

Rule 616. If any of the parties, after due notice, fails to appear at a hearing or any adjourned hearing session, the arbitrators may, in their discretion, proceed with the arbitration of the controversy. In such cases, all awards shall be rendered as if each party had entered an appearance in the matter submitted.

## ¶ 2617

## Adjournments

Rule 617. (a) The arbitrators may, in their discretion, adjourn any hearing(s) either upon their own initiative or upon the request of any party to the arbitration.

(b) A party requesting an adjournment after arbitrators have been appointed, if said adjournment is granted, shall pay a fee equal to the deposit of costs but not more than \$100. The arbitrators may waive this fee or in their awards may direct the return of this adjournment fee. This provision shall not apply to cases filed pursuant to Rule 601.

## Amendment.

June 18, 1986.

## ¶ 2618

## Acknowledgement of Pleadings

Rule 618. The arbitrators shall acknowledge to all parties present that they have read the pleadings filed by the parties.

## ¶ 2619

## Subpoena Process

Rule 619 (a) The arbitrators and any counsel of record to the proceeding shall have the power of the subpoena process as provided by law. However, the parties shall produce witnesses and present proofs to the fullest extent possible without resort to the issuance of the subpoena process

(b) Prior to the first hearing session, the parties shall cooperate in the voluntary exchange of such documents and information as will serve to expedite the arbitration. If the parties agree, they may also submit additional documents to the Director of Arbitration for forwarding to the arbitrators

## ¶ 2620

## Power to Direct Appearances

Rule 620. The arbitrators shall be empowered without resort to the subpoena process to direct the appearance of



any person employed or associated with any member or member organization of the New York Stock Exchange, Inc, and/or the production of any records in the possession or control of such persons, members or member organizations. Unless the arbitrators direct otherwise, the party requesting the appearance of a person or the production of documents under this section shall bear all reasonable costs of such appearance and/or production.

#### ¶ 2621

##### Evidence

Rule 621. The arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence.

#### ¶ 2622

##### Interpretation of Code

Rule 622. The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties.

#### ¶ 2623

##### Determinations of Arbitrators

Rule 623. All rulings and determinations of the panel shall be by a majority of the arbitrators.

#### ¶ 2624

##### Record of Proceedings

Rule 624. Unless requested by the arbitrators or a party or parties to a dispute, no record of an arbitration proceeding shall be kept. If a record is kept, it shall be a verbatim record. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request.

#### ¶ 2625

##### Oaths of the Arbitrators and Witnesses

Rule 625. Prior to the commencement of the first session, an oath or affirmation shall be administered to the arbitrators. All testimony shall be under oath or affirmation.

#### ¶ 2626

##### Amendments

Rule 626. (a) After the filing of any pleadings, if a party desires to file a new or different pleading, such change must be made in writing and filed with the Director of Arbitration. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise upon all other parties a copy of said change. The other parties may, within ten (10) business days from the receipt of service, file a response with the Director of Arbitration.

(b) After a panel has been appointed, no new or different pleading may be filed except for a responsive

pleading as provided for in (a) above or with the panel's consent.

Amendment.

December 6, 1984.

# ¶ 2627

## Reopening of Hearings

Rule 627. Where permitted by law, the hearings may be reopened by the arbitrators on their own motion or in the discretion of the arbitrators upon application of a party at any time before the award is rendered.

# ¶ 2628

## Awards

Rule 628. (a) All awards shall be in writing and signed by a majority of the arbitrators or in such manner as is required by law. Such awards may be entered as a judgment in any court of competent jurisdiction.

(b) Unless the law directs otherwise, all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal.

(c) The Director of Arbitration shall endeavor to serve a copy of the award: (i) by registered or certified mail upon all parties, or their counsel, at the address of record; or, (ii) by personally serving the award upon the parties; or, (iii) by filing or delivering the award in such manner as may be authorized by law.

(d) The arbitrator(s) shall endeavor to render an award within thirty (30) business days from the date the record is closed.

# ¶ 2629

## Miscellaneous

Rule 629. This Code shall be deemed a part of and incorporated by reference in every duly-executed Submission Agreement which shall be binding on all parties.

# ¶ 2630

## Schedule of Fees

Rule 630. (a) At the time of filing a Submission Agreement, a Claimant shall deposit with the New York Stock Exchange, Inc. the amount indicated below unless such deposit is specifically waived by the Director of Arbitration.

<i>Amount in Dispute</i> (Exclusive of interest and expenses)	<i>Deposit</i>
\$1,000 or less	\$ 15
Above \$ 1,000 - but not exceeding \$ 2,500	25
Above \$ 2,500 - but not exceeding \$ 5,000	100
Above \$ 5,000 - but not exceeding \$ 10,000	200
Above \$ 10,000 - but not exceeding \$ 20,000	300
Above \$ 20,000 - but not exceeding \$100,000	500
Above \$100,000	750

Where the amount in dispute is \$10,000 or less, no additional deposits shall be required despite the number of sessions. Where the amount in dispute is above \$10,000 and multiple sessions are required, the arbitrators may require any of the parties to make additional deposits for

each additional session. In no event shall the aggregate amount deposited per session exceed the amount of the initial deposit as set forth in the above schedule.

(b) The arbitrators, in their awards, may determine the amount chargeable to the parties as forum fees (fees) and shall determine by whom such fees shall be borne. Where the amount in dispute is \$10,000 or less, total fees to the parties shall not exceed the amount deposited. Where the amount in dispute is above \$10,000 but does not exceed \$20,000, the maximum fee shall be \$300 per session. Where the amount in dispute is above \$20,000 but does not exceed \$100,000, the maximum fee shall be \$500 per session. Where the amount in dispute is above \$100,000, the maximum fee shall be \$750 per session. In no event shall the fees assessed by the arbitrators exceed \$750 per session. Amounts deposited by a party shall be applied against fees, if any. If the fees are not assessed against a party who has made a deposit, the deposit will be refunded.

(c) If the dispute, claim or controversy does not involve or disclose a money claim, the amount to be deposited by the Claimant shall be \$100, or such amount as the director of arbitration or the panel of arbitrators may require but shall not exceed \$750.

(d) Any matter submitted and thereafter settled or withdrawn prior to the commencement of the first session shall entitle the parties to a refund of all but \$25 of the amount deposited with the New York Stock Exchange, Inc.

(e) Any matter submitted, and thereafter settled or withdrawn subsequent to the commencement of the first

session may be subject to such refund of assessed deposits, if any, as the New York Stock Exchange, Inc. may determine.

(f) The arbitrators may assess forum fees and Rule 620 costs in any matter settled or withdrawn subsequent to the commencement of the first session.

Amendment.

December 6, 1984.

#### ¶ 2631

##### Uniform Arbitration Code

Rule 631. The provisions of the Uniform Arbitration Code contained in Rules 600 through 630 shall also apply to controversies between members, allied members, member firms, member organizations and/or non-members who are not public customers, except insofar as such provisions specifically apply to matters involving public customers.

Amendment.

June 18, 1986.

#### ¶ 2632

##### Schedule of Fees for Member Controversies

Rule 632. At the time of filing a Submission Agreement, a Claimant shall deposit with the New York Stock Exchange, Inc. the amount indicated below:



	<i>Deposit Per Hearing</i>
\$5000 or less	\$100*
\$5000 or more but less than \$100,000	\$500
\$100,000 or more	\$750

Where the controversy does not involve a money claim, the costs and the amount to be deposited shall be such amount as may be fixed in advance by the Exchange, except that such amount shall not exceed \$750 per hearing.

When the controversy is resolved in any way other than by arbitration award, the Exchange shall retain \$25.

#### ¶ 2633

##### Member Controversies

Rule 633. Any controversy between parties who are members, allied members, member firms or member corporations shall be submitted for arbitration to members of the Board of Arbitration, unless non-members are also parties to the controversy. If the amount (exclusive of interest and costs) involved in the controversy is less than \$10,000 the controversy shall be heard by one arbitrator. If such amount is \$10,000 or more the controversy shall be heard by at least three but not more than five arbitrators. If non-members are also parties to such controversies, the arbitrators shall be appointed in accordance with

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\* This shall also be the fee for non-member claimants who are not public customers.

Rule 607 unless the non-member(s) consent to arbitration before members of the Board of Arbitration.

Adopted.

November 30, 1983.

Amendment

June 18, 1986.

#### ¶ 2634

##### Filing Fee for Member Non-Member Controversies

Rule 634. A member organization shall, when filing a claim against a non-member, pay a non-refundable filing fee of \$500. This fee shall be an addition to all other fees, deposits or costs which may be required.

Adopted.

December 6, 1984.

#### ¶ 2635

##### Board of Arbitration

Rule 635. Promptly after the annual election of the Exchange, the Chairman of the Board of Directors shall appoint, subject to the approval of the Board of Directors, a Board of Arbitration to be composed of such number of present or former members, allied members and officers of member corporations of the Exchange who are not members of the Board of Directors as the Chairman of the Board of Directors shall deem necessary to serve at the pleasure of the Board of Directors or until the next annual

election of the Exchange and their successors are appointed and take office.

Adopted.

May 20, 1987.

#### ¶ 2636

##### Panel of Arbitrators

Rule 636. The Chairman of the Board of Directors shall from time to time appoint two panels of arbitrators, composed of persons who are residents of or have their places of business in the Metropolitan area of the City of New York. The first of such panels shall be composed of persons engaged in or retired from the securities business and the second of such panels shall be composed of persons not engaged in the securities business. The Chairman of the Board of Directors may likewise appoint panels similar to the panels above described to serve outside the City of New York.

Adopted.

May 20, 1987.

#### ¶ 2637

##### Director of Arbitration

Rule 637. The Chairman of the Board, shall designate one of the officers or other employees of the Exchange as Director of Arbitration. The Director of Arbitration shall be charged with the duty of performing all

ministerial duties in connection with matters submitted for arbitration pursuant to these Rules.

Adopted.

May 20, 1987.

#### ¶ 2638

##### Exchange of Documents

Rule 638. At least ten days prior to the date assigned for a hearing, the parties shall exchange documents in their possession which they intend to introduce to the arbitrators. The arbitrators may exclude from the arbitration any document not so exchanged.

Adopted.

May 20, 1987.

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IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF NORTH CAROLINA

ROBERT D. GILMER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action NO.
	)	C-C-88-0396-M
INTERSTATE SECURITIES	)	
CORPORATION,	)	
	)	
Defendant.	)	

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AFFIDAVIT OF FRANKLIN C. GOLDEN IN  
SUPPORT OF DEFENDANT'S MOTION TO COMPEL  
ARBITRATION AND MOTION TO  
DISMISS COMPLAINT

(Filed Nov. 4, 1988)

PERSONALLY APPEARED before me Mr. Franklin C.  
Golden who upon oath deposes and states as follows:

1. My name is Franklin C. Golden and in 1987, I was employed as Senior Vice President, Director of Sales for Interstate Securities Corporation in Charlotte, North Carolina. I am familiar with the job responsibilities and requirements of the positions held by Mr. Robert Gilmer, Vice President, Manager of Mutual Funds and Ms. Carla Griffin, Supervisor, Mutual Funds. As a part of his employment, Mr. Gilmer was required to be a registered securities agent on behalf of Interstate Securities. He had applied for this registration on May 26, 1981 and was subsequently registered (see attachment A, a true copy of Mr. Gilmer's registration application). However, Ms. Griffin was not required to be a registered securities agent in her job.

2. Following Mr. Gilmer's separation from employment, Ms. Griffin was assigned responsibility for only the administrative portion of Mr. Gilmer's former position. This new responsibility for Ms. Griffin did not include Mr. Gilmer's former responsibilities for mutual fund trading as regulated by the National Security Exchanges. Thus, she was not required to have a securities registration on behalf of Interstate Securities to fulfill this added responsibility.

3. The statements I have made on this page and on the preceding one page are true and correct based on my personal knowledge.

Dated this 4th day of November, 1988.

/s/ Franklin C. Golden  
Franklin C. Golden

Subscribed and sworn to before me  
this 4th day of November, 1988.

/s/ Elsie Millwood  
Notary Public

My commission expires: May 15, 1990



IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ROBERT D. GILMER,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	C-C-88-0396-M
	)	
INTERSTATE SECURITIES	)	
CORPORATION,	)	
	)	
Defendant.	)	

Attachment A  
to Affidavit of Frank Golden  
in Support of  
Defendant's Motion to Compel Arbitration  
and to Dismiss Complaint  
[Reprinted at pages 15-18 of this Joint Appendix]

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF NORTH  
CAROLINA Charlotte Division  
C-C-88-396-M

ROBERT D. GILMER,	)	
	)	
Plaintiff,	)	ORDER
	)	(Filed
-vs-	)	Nov. 4, 1988)
	)	
INTERSTATE SECURITIES	)	
CORPORATION,	)	
	)	
Defendant.	)	

Pursuant to a hearing on November 2, 1988, the court is of the opinion that the motion to dismiss should be DENIED.

Counsel for the plaintiff will draw and serve upon opposing counsel and tender findings of fact, conclusions of law and an order consistent with this decision.

IT IS SO ORDERED, this 3 day of November, 1988.

/s/ James B. McMillan  
James B. McMillan  
United States  
District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ROBERT D. GILMER,

Plaintiff,

v.

INTERSTATE SECURITIES  
CORPORATION,

Defendant.

Civil Action No.  
C-C-88-0396-M

NOTICE OF APPEAL

(Filed Nov. 29, 1988)

Notice is hereby given that Interstate Securities Corporation, Defendant above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Order denying Defendant's Motion to Compel Arbitration and to Dismiss Complaint entered in this action on the 4th day of November, 1988. This appeal is taken as of right pursuant to 28 U.S.C. § 1291 and the "collateral order" doctrine articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 69 S.Ct. 1221, 337 U.S. 541, 93 L.Ed. 1528 (1949), or in the alternative pursuant to 28 U.S.C. § 1291(a)(1).

Dated this 29th day of November, 1988.

Respectfully submitted,

HAYNSWORTH, BALDWIN,  
MILES, JOHNSON, GREAVES  
AND EDWARDS, P.A.

By: /s/ James B. Spears, Jr.  
James B. Spears, Jr.

By: /s/ Robert S. Phifer  
Robert S. Phifer

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Other counsel of record are:

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Charlotte, NC 28202-6001

Attorneys for Robert D. Gilmer

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ROBERT D. GILMER,

Plaintiff,

v.

INTERSTATE SECURITIES  
CORPORATION,

Defendant.

Civil Action No.  
C-C-88-0396-M

MOTION FOR STAY OF PROCEEDINGS  
PENDING APPEAL

(Filed Dec. 2, 1988)

Now comes Defendant, Interstate Securities Corporation, by and through its counsel, and moves, pursuant to Rule 62 of the Federal Rules of Civil Procedure, for a stay of proceedings in this action. Defendant seeks this stay pending its appeal from the Court's November 4, 1988 Order denying Defendant's Motion to Compel Arbitration and to Dismiss.

On November 29, 1988, Defendant timely filed its Notice of Appeal regarding the November 4, 1988 order. At that time, pending before the Court were the Court's Pretrial Order, filed November 22, 1988, which set schedules for Defendant to file its Answer, for completion of discovery and for other pretrial proceedings; Defendant's Motion for Stay of Discovery, filed October 11, 1988; Plaintiff's Motion for Leave to Videotape Depositions (granted by Court Order dated November 29, 1988); and Plaintiff's Notice of Depositions, filed September 30,

1988, which set depositions of three (3) of Defendant's management officials. Plaintiff also served on Defendant a Motion for Entry of Default Judgment Pursuant to Rule 55 after Defendant had filed its Notice of Appeal. By the present motion Defendant requests that the Court stay the operation of its Pretrial Order and all further proceedings in this case, including any proceedings on matters now pending before the Court, during the pendency of Defendant's appeal.

Because Plaintiff will not be harmed by a stay of proceedings at this point, Defendant further moves the Court to waive any requirement that Defendant post a bond as a condition of the stay. Alternatively, Defendant requests that the Court require a bond only in an amount sufficient to secure the costs of the present appeal.

WHEREFORE, Defendant prays that the Court grant its motion and stay all further proceedings in this matter pending completion of Defendant's appeal of the Court's November 4, 1988 Order, and further prays that the Court waive the requirement of a bond as a condition of the stay.

Dated this 2nd day of December, 1988.

Respectfully submitted,

HAYNSWORTH, BALDWIN,  
MILES, JOHNSON, GREAVES  
AND EDWARDS

/s/ James B. Spears, Jr.  
James B. Spears, Jr.

/s/ Robert S. Phifer  
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 Securities Corporation

IN THE DISTRICT COURT OF THE UNITED STATES  
 FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
 Charlotte Division C-C-88-0396-M

ROBERT D. GILMER,

Plaintiff,

vs.

INTERSTATE SECURITIES  
 CORPORATION,

Defendant.

ORDER

(Filed  
 Jan. 17, 1989)

On November 29, 1988, plaintiff filed motions for entry of default pursuant to Rules 37 and 55 of the Federal Rules of Civil Procedure. After due consideration of the information now before the court concerning this issue, the court has concluded that plaintiff's motions should be, and they are, DENIED.

On December 2, 1988, defendant filed a motion to stay proceedings pending the outcome of defendant's appeal of the court's order denying defendant's motion to compel arbitration. On January 4, 1989, plaintiff filed a response opposing defendant's motion for stay. Plaintiff contends that the order denying the motion to compel arbitration was injunctive in nature, and therefore defendant is not entitled to a stay upon the posting of a supersedeas bond pursuant to Rule 62(d). Plaintiff maintains that the granting of a stay should be determined pursuant to Rule 62(c) as an injunctive order.

Case law is well settled that an order denying a motion to compel arbitration is injunctive in nature. *Taylor v. Nelson*, 788 F.2d 220, 223 (4th Cir. 1986). Under Rule 62(c), a four factor test is used to determine whether a stay pending the appeal is appropriate. *Belcher v. Birmingham Trust National Bank*, 395 F.2d 685 (5th Cir. 1968). The factors to be considered are:

- (1) the likelihood that the petitioner will prevail on the merits of the appeal;
- (2) irreparable injury to the petitioner unless the stay is granted;
- (3) no substantial harm to other interested persons; and
- (4) no harm to the public interest.

By its nature, an injunction denying a motion to compel arbitration can inflict irreparable harm since the goal of agreeing to arbitration, avoiding the expense and delay of a trial, is lost. However, the current motion for stay contemplates not only staying the trial itself, but also preventing even initial discovery in preparation for a possible trial should the appeal be denied. After weighing the four factors set forth above, the court is of the opinion, and rules, that defendant's motion for stay pending the outcome of the appeal is DENIED.

IT IS SO ORDERED, this 17 day of January, 1989.

/s/ James B. McMillan  
James B. McMillan  
United States  
District Judge

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE  
WESTERN DISTRICT OF NORTH CAROLINA  
Charlotte Division C-C-88-0396-M

ROBERT D. GILMER,

Plaintiff,

vs.

INTERSTATE SECURITIES  
CORPORATION,

Defendant.

FINDING OF  
FACT AND  
CONCLUSIONS  
OF LAW  
(Filed  
Jan. 17, 1989)

Defendant has filed a motion to compel arbitration and to dismiss the complaint. Plaintiff in his complaint seeks relief in the form of lost wages and benefits, reinstatement and reasonable attorney's fees under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.* (ADEA). After reviewing the record and hearing arguments of counsel, the court finds as follows:

#### FINDINGS OF FACT

1. Plaintiff began his employment with defendant on May 18, 1981, as Manager of Financial Services. Defendant terminated plaintiff's employment on November 13, 1987, at which time he held the position of Senior Vice President, Manager of Mutual Funds.

2. On May 26, 1981, eight days after plaintiff was employed, plaintiff completed and signed a "Uniform Application for Securities Industries Registration or

Transfer" (Form U-4) with the American Stock Exchange, National Association of Security Dealers (NASD), and the New York Stock Exchange (NYSE) in the State of North Carolina. Plaintiff had previously passed the NASD and NYSE exams.

3. Paragraph 5 of the uniform application provides:

I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register, as indicated in Question 8.

NYSE Rule 347 provides for the arbitration of "any controversy . . . arising out of the employment or termination of employment" of a registered securities representative.

4. Neither the uniform application nor the NYSE rules make any reference to claims under Title VII of the Civil Rights Act or the ADEA.

#### CONCLUSIONS OF LAW

1. Title VII, 42 U.S.C. § 2000e, *et seq.*, was enacted to prohibit employment discrimination based on "race, color, religion, sex, or national origin" and the ADEA was enacted "to prohibit arbitrary age discrimination in employment." Both statutes express strong federal policy against any kind of discrimination in the work place.

2. Plaintiff seeks equitable relief in the form of reinstatement. The ADEA provides that "a person shall be entitled to a trial by jury on any issue of fact in any such action for recovery of amounts owing by a violation of

this Act, regardless of whether equitable relief is sought by any such party in such action." 29 U.S.C. § 626(c)(2).

3. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), a unanimous court held that an employee alleging violations of Title VII was entitled to trial *de novo* after his claim was arbitrated unsuccessfully. The Supreme Court reasoned that arbitration procedures were not well suited to the final resolution of rights created by Title VII. This reasoning is applicable to claims under the ADEA.

4. This court is also of the opinion that Congress intended to protect ADEA claimants from the waiver of a judicial forum. Plaintiff is entitled to a jury trial on any factual issues for recovery of damages for violation of ADEA.

Based upon the findings of fact and conclusions of law set forth above, defendant's motion to dismiss is hereby DENIED.

IT IS SO ORDERED, this 17 day of January, 1989.

/s/ James B. McMillan  
James B. McMillan  
United States  
District Judge

(Certificate Of Service Omitted In Printing)



APPENDIX AND REPLY BRIEF OF APPELLANT  
 \*\*\*AMENDED\*\*\*RULE 619, GENERAL PROVISION  
 GOVERNING PRE-HEARING PROCEEDING

(a) Requests for Documents and Information.

The parties shall cooperate to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration. Any request for documents or other information should be specific, relate to the matter in controversy, and afford the party to whom the request is made a reasonable period of time to respond without interfering with the time set for the hearing.

(b) Document Production and Information Exchange.

(1) Any party may serve a written request for information or documents ("information request") upon another party twenty (20) business days or more after service of the Statement of Claim by the Director Arbitration or upon filing of the Answer, whichever is earlier. The requesting party shall serve the information request on all parties and file a copy with the Director of Arbitration. The parties shall endeavor to resolve disputes regarding an information request prior to serving any objection to the request. Such efforts shall be set forth in the objection.

(2) Unless a greater time is allowed by the requesting party, information requests shall be satisfied or objected to within thirty (30) calendar days from the date of service. Any objection to an information request shall be served by the objecting party on all parties and filed with the Director of Arbitration.

(3) Any response to objections to an information request shall be served on all parties and filed with the Director of Arbitration within ten (10) calendar days of receipt to the objection.

(4) Upon the written request of a party whose information request is unsatisfied, the matter will be referred by the Director of Arbitration to either a pre-hearing conference under paragraph (d) of this section or to a selected arbitrator under paragraph (e) of this section.

(c) Pre-Hearing Exchange.

At least ten (10) calendar days prior to the first scheduled hearing date, all parties shall serve on each other copies of documents in their possession that they intend to present at the hearing and identify witnesses they intend to present at the hearing. The arbitrator(s) may exclude from the arbitration, any documents not exchanged or witnesses not identified at that time. This paragraph does not require service of copies of documents or identification of witnesses which parties may use for cross-examination or rebuttal.

(d) Pre-Hearing Conference

(1) Upon the written request of a party, an arbitrator, or at the discretion of the Director of Arbitration, a pre-hearing conference shall be scheduled. The Director of Arbitration shall set the time and place of a pre-hearing conference and appoint [sic] a person to preside. The pre-hearing conference may be held by telephone conference call. The presiding person shall seek to achieve agreement among the parties on any issues that

relate to the pre-hearing process or to the hearing, including but not limited to, the exchange of information, exchange or production of documents, identification of witnesses, identification and exchange of hearing documents, stipulations of fact, identification and briefing of contested issues, and any other matter which will expedite the arbitration proceedings.

(2) Any issues raised at the pre-hearing conference that are not resolved may be referred by the Director of Arbitration to a single member of the Arbitration Panel for decision.

(e) Decisions by Selected Arbitrator

The Director of Arbitration may appoint a single member of the Arbitration Panel to decide all unresolved issues referred to under this section. Such arbitrator shall be authorized to act on behalf of the panel to issue subpoenas, direct appearances of witnesses and production of documents, [sic] set deadlines and issue any other ruling which will expedite the arbitration proceeding or is necessary to permit any party to develop fully its case. Decisions under this paragraph shall be made upon the papers submitted by the parties, unless the arbitrator calls a hearing. The arbitrator may elect to refer any issue under this paragraph to the full panel.

(f) Subpoenas

The arbitrator(s) and any counsel of record to the proceedings shall have the power of the subpoena process as provided by law. All parties shall be given a copy

of the subpoena upon its issuance. The parties shall produce witnesses and present proofs to the fullest extent possible without resort to the subpoena process.

(g) Power to Direct Appearance and Production of Documents

The arbitrator(s) shall be empowered without resort to the subpoena process to direct the appearance of any person employed or associated with any member or member organization of the New York Stock Exchange, Inc. and/or the production of any records in the possession or control of such persons or members. Unless the arbitrator(s) direct otherwise, the party requesting the appearance of a person or the production of documents under this section shall bear all reasonable costs of such appearance and/or production.

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5  
No. 90-18

Supreme Court, U.S.

FILED

NOV 15 1990

JOSEPH F. SPANIOL, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1990

ROBERT D. GILMER,

*Petitioner,*

v.

INTERSTATE/JOHNSON LANE CORPORATION,

*Respondent.*

On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fourth Circuit

BRIEF ON THE MERITS FOR PETITIONER

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**QUESTION PRESENTED**

Are claims brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), subject to compulsory arbitration?

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Petitioner Robert D. Gilmer (hereinafter "Gilmer") respectfully prays that the decision of the United States Court of Appeals for the Fourth Circuit issued on February 6, 1990, be reversed.

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I.

## CITATION TO OPINIONS BELOW

The decision of the Fourth Circuit is officially reported at 895 F.2d 195. The Court's decision appears in Appendix "A" of the Petition for Writ of Certiorari (App. 1a-36a). The decision of the Fourth Circuit denying Gilmer's petition for rehearing and suggestion for rehearing in banc appears in Appendix "B" of the Petition for Writ of Certiorari (App. 37a-38a). The decision of the U.S. District Court for the Western District of North Carolina appears in Appendix "C" of the Petition for Writ of Certiorari (App. 39a-42a).

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II.

## JURISDICTION

The decision of the Fourth Circuit was issued on February 6, 1990. Gilmer's petition for rehearing and suggestion for rehearing in banc were denied on March 28, 1990. Gilmer filed his petition for writ of certiorari within 90 days of that date as required under 28 U.S.C. § 2101(c) and Rule 13(1) of the Rules of the United States Supreme Court. Gilmer invoked this Court's jurisdiction

under 28 U.S.C. § 1254(1). This Court granted certiorari on October 1, 1990.

---

### III.

#### STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act (9 U.S.C. § 2) provides as follows:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Age Discrimination in Employment Act (29 U.S.C. § 626(c)) provides in pertinent part as follows:

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *provided*, that the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this Chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this

chapter, regardless of whether equitable relief is sought by any party in such action.

The entire text of sections 621, 623, and 626 of the ADEA is reproduced in an Appendix to this Brief.

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### IV.

#### STATEMENT OF THE CASE

##### A. THE FACTS

Defendant Interstate Securities Corporation ("Interstate") hired Gilmer on May 18, 1981, as Manager of Financial Services. One week after he was hired, Gilmer was required to sign a registration application with the New York Stock Exchange ("NYSE"). The application is four pages long and written in six-point type. Paragraph V of the registration form, also in six-point type, provides as follows: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register. . . ." (J.A. 18)

NYSE Rule 347, which was not reproduced on Gilmer's application, provides for the arbitration of "[a]ny controversy . . . arising out of the employment or termination of employment" of a registered securities representative. Neither the application nor Rule 347 makes any specific reference to age or other employment discrimination claims. Moreover, neither spells out precisely what arbitration means.



More than six years later, Interstate terminated Gilmer's employment. Gilmer was 62 years old when he was terminated, and his replacement was 28 years old. Gilmer filed suit under the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. § 621, *et seq.*, hereinafter referred to as "ADEA"), to secure reinstatement, and full restitution and payment of all lost wages and benefits resulting from his discharge. (J.A. 8) The jurisdiction of the court was conferred by § 7(c) of the ADEA (29 U.S.C. § 626(c)) and § 15(b) of the Fair Labor Standards Act (29 U.S.C. § 216(b)). (J.A. 4-5)

Interstate filed a motion to compel arbitration and to dismiss Gilmer's complaint because of the arbitration clause in the NYSE registration application. (J.A. 10-12)

## B. PROCEDURAL HISTORY

The U.S. District Court for the Western District of North Carolina held that Gilmer could not be compelled to arbitrate his ADEA claim. (App. 39a-42a.)

Interstate appealed to the Fourth Circuit, which reversed the District Court's decision, concluding that there was no indication of congressional intent to bar compulsory arbitration of ADEA claims and that there was no invalid prospective waiver of the judicial forum for Gilmer's ADEA claims. (App. 1a-36a.)

Gilmer petitioned the Fourth Circuit for rehearing and suggestion for rehearing in banc. By order dated

March 28, 1990, the Fourth Circuit denied the petition. (App. 37a-38a.)

Gilmer petitioned this Court for a Writ of Certiorari within 90 days, as required by 28 U.S.C. § 2101(c) and Rule 13(1) of the Rules of United States Supreme Court. Certiorari was granted on October 1, 1990, on the issue of whether ADEA claims can be subjected to compulsory arbitration.

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## V.

### SUMMARY OF THE ARGUMENT

This Court has consistently held that statutory claims involving minimum substantive guarantees to workers are not subject to compulsory arbitration, notwithstanding the federal policy favoring arbitration. With regard to claims arising under Title VII, the Fair Labor Standards Act, 42 U.S.C. § 1983, and the Federal Employees Liability Act, the Court has held that claimants were not bound by the unfavorable decisions of arbitrators and were still entitled to pursue their claims in court. There is no meaningful distinction between the Age Discrimination in Employment Act and these other types of claims; therefore, the Court should find that ADEA claims are not subject to compulsory arbitration. Moreover, there is no meaningful distinction between arbitration pursuant to collective bargaining agreements or the Railway Labor Act, in which the Court has refused to compel arbitration, and the Federal Arbitration Act, which is at issue in this case. Although this court has held in three cases that agreements to arbitrate were enforceable with respect to



Federal statutory claims, those cases arose in a business context, and the reasoning of those decisions does not apply in employment discrimination cases.

Even if this Court should deem it appropriate to apply the two-part test as set forth in *Mitsubishi v. Soler Chrysler-Plymouth*, it should nonetheless hold that ADEA claims are not subject to compulsory arbitration. Under the *Mitsubishi* test, a statutory claim will not be arbitrable if either (1) there is no valid agreement to arbitrate, or (2) Congress has evidenced an intent to preclude arbitration. Here, the congressional intent is clear. Congress has recently stated in the Title VII context that, although arbitration and other forms of alternative dispute resolution are to be encouraged, they should not preclude claimants from pursuing the remedies provided by statute. Moreover, compulsory arbitration is inconsistent with the statutory scheme Congress set forth in Title VII and the ADEA. Congress' intent to remedy age discrimination would be frustrated by compulsory arbitration because the NYSE Rules would force plaintiff's claim to be heard by arbitrators from the very industry that is the defendant. Arbitration's restricted discovery makes it difficult for plaintiffs to prove the subtle discrimination that Congress intended to eradicate. The lack of written opinions makes appeal difficult, disguises compromise awards, and makes it impossible for employers to gauge the legality of their conduct. The severely limited grounds for appeal of an arbitrator's award conflict with the congressional intent to provide "overlapping remedies" to plaintiffs under the employment discrimination laws. Although they can resolve the immediate dispute between the parties, arbitrators cannot monitor

long-term injunctive relief or make sweeping institutional reform, which is often necessary in employment discrimination cases. Finally, the main focus of arbitration is economic, whereas Congress' main focus under the ADEA is personal dignity and equal protection, issues that are most appropriately addressed by the courts.

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## VI.

### ARGUMENT

#### A. THIS COURT HAS RECOGNIZED THAT CERTAIN CLAIMS BASED ON INFRINGEMENTS OF INDIVIDUAL RIGHTS ARE NOT SUBJECT TO COMPULSORY ARBITRATION, AND AGE DISCRIMINATION SHOULD BE ONE OF THOSE CLAIMS.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), this Court unanimously held that an employee alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.*, (hereinafter "Title VII"), was entitled to a trial *de novo* after his claim for race discrimination was arbitrated unsuccessfully pursuant to a collective bargaining agreement. This Court held as follows:

[W]e have long recognized that "the choice of forums inevitably affects the scope of the substantive right to be vindicated." . . . Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII . . . [T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . On the other hand, the resolution

of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

415 U.S. at 56-57, 94 S. Ct. at 1023-24, 39 L. Ed. 2d at 163 (citations and footnote omitted).

Similarly, in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981), this Court held that a claimant under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (hereinafter "FLSA"), was not barred by the unfavorable decision of an arbitrator. The claimants, truck drivers, had alleged that pre-trip safety inspection and transportation time was compensable under the FLSA. This Court declared: "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." 450 U.S. at 740, 101 S. Ct. at 1441, 67 L. Ed. 2d at 653. The ADEA is part of the FLSA.

In *McDonald v. City of West Branch*, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984), where a police officer alleged that he was discharged for exercising his constitutional rights, this Court held that an arbitrator's decision in a civil rights claim under 42 U.S.C. § 1983 has no *res judicata* or collateral estoppel effect, regardless of whether the parties had an agreement to the contrary.

The foregoing cases involve statutes analogous to the ADEA. Title VII, § 1983, and the ADEA focus on personal dignity and equal protection. Both Title VII and the ADEA are designed to ensure that employment decisions

are not based on characteristics that are beyond the employee's control and that have no relevance to job performance. "In fact, the prohibitions of the ADEA were derived in *haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S. Ct. 866, 872, 55 L. Ed. 2d 40, 48 (1978). As already noted, the ADEA is part of the FLSA and incorporates the FLSA's remedies.

*Alexander*, *Barrentine*, and *McDonald* involved arbitration pursuant to collective bargaining agreements rather than the Federal Arbitration Act ("FAA"), which is at issue in this case. However, there is no meaningful distinction between the two. Indeed, in some respects arbitration of employment discrimination claims under the FAA is even less appropriate than labor arbitration; for example, a labor arbitrator issues a written opinion, whereas a commercial arbitrator does not. If arbitration of employment discrimination and analogous claims under a collective bargaining agreement is inappropriate, then arbitration of such claims under the FAA is also inappropriate.

Respondent contends that the reasoning of *Alexander*, *Barrentine*, and *McDonald* is outdated by this Court's more recent decisions on arbitration. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) (involving claims under Sherman Act), the Court held that arbitration under the FAA was not necessarily precluded simply because a plaintiff was invoking a statutory right. The Court set forth a two-part test to determine whether an agreement



to arbitrate was enforceable: a plaintiff could not be compelled to arbitrate if (1) the dispute was outside the scope of the arbitration clause, or (2) Congress evidenced an intent to preclude arbitration. *Id.*

The Court has upheld agreements to arbitrate federal statutory claims in two decisions after *Mitsubishi*. In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332, 96 L.Ed.2d 185, *reh'g denied*, 483 U.S. 1056, 108 S. Ct. 31, 97 L.Ed.2d 819 (1987), the Court held that mandatory arbitration of claims under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act was not precluded. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L.Ed.2d 526 (1989), the Court held that mandatory arbitration of claims under the Securities Act of 1933 was not precluded, overruling its prior decision in *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953).

In contrast to the case at bar, *Mitsubishi*, *McMahon* and *Rodriguez de Quijas* involve disputes arising in a business context.<sup>1</sup> They differ from employment discrimination in several essential ways: First, they involve parties of relatively equal bargaining power or at least with the freedom to walk away from a bad bargain. This is not the case in employment: a job applicant's very livelihood may depend on his agreeing to the arbitration clause.

<sup>1</sup> Compare *Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520, 96 L.Ed.2d 426 (1987) (FAA preempts California statute precluding compulsory arbitration of wage collection claims). The sole issue in *Perry* was whether the FAA preempted state law to the contrary.

Second, these business-oriented claims do not implicate statutes "designed to provide minimum substantive guarantees to individual workers." See *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987) (railroad employee bringing suit under Federal Employees Liability Act cannot be compelled to arbitrate, even though Railway Labor Act ("RLA") provides for arbitration).

In *Buell*, this Court, unanimously recognizing that RLA claims are distinguishable from the more economic, contract-oriented claims at issue in *Mitsubishi*, *McMahon*, and *Rodriguez de Quijas*, did not apply the *Mitsubishi* test:

This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. See, e.g., *McDonald v. West Branch*, 466 U.S. 284, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine*, *supra*, at 737, 67 L. Ed. 2d 641, 101 S. Ct. 1437.

*Buell*, 480 U.S. at 564-65, 94 L. Ed. 2d at 572-73. *Buell*, unanimously decided two years after *Mitsubishi*, demonstrates that this Court has wisely treated employment discrimination and related claims as "a breed apart" from



the kinds of claims at issue in *Mitsubishi*, *McMahon*, and *Rodriguez de Quijas*. Nor did the Court distinguish arbitration pursuant to a collective bargaining agreement from arbitration pursuant to a federal statute (RLA). There is no reason to treat arbitration under the RLA differently from arbitration under the FAA.

Every circuit that has addressed the issue, except the Fourth, has held that Title VII or ADEA claims are not subject to compulsory arbitration. See *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990) (Title VII); *Uitley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), cert. denied, \_\_\_ U.S. \_\_\_, 110 S. Ct. 842, 107 L. Ed. 2d 836 (1990) (Title VII); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989) (ADEA); *Swenson v. Mgmt. Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), cert. denied, \_\_\_ U.S. \_\_\_, 110 S. Ct. 143, 107 L. Ed. 2d 102 (1989) (Title VII).

This Court should apply its reasoning in *Alexander*, *Barrentine*, *McDonald*, and *Buell* to the ADEA because it is a statute "designed to provide minimum substantive guarantees to individual workers." The decision of the Fourth Circuit, which is contrary to the decisions of the other circuits, should be reversed.

#### **B. EVEN UNDER THE MITSUBISHI TEST, ADEA CLAIMS ARE NOT SUBJECT TO COMPULSORY ARBITRATION.**

Under this Court's decisions in *Alexander*, *Barrentine*, *McDonald*, and *Buell*, it is unnecessary to apply the *Mitsubishi* test to an employment discrimination claim. Even if the *Mitsubishi* test were to apply, this Court should nonetheless hold that ADEA claims are not subject to compulsory arbitration.

Assuming a valid agreement to arbitrate, which in this case Gilmer has denied,<sup>2</sup> under *Mitsubishi* this Court would next examine whether Congress has evidenced an intent to preclude binding agreements to arbitrate ADEA claims. Clearly, Congress has done so.

#### **1. Congress Has Expressly Indicated Its Intent to Preclude Binding Arbitration of Employment Discrimination Claims.**

When the ADEA was enacted in 1967, it was unnecessary for Congress to expressly preclude arbitration because the case law at the time precluded arbitration of statutory claims. See, e.g., *Wilko v. Swan*, *supra*. Not surprisingly, the ADEA itself contains no express language indicating congressional intent with regard to arbitration; however, after this Court's more recent decisions in *Mitsubishi*, *McMahon*, and *Rodriguez de Quijas*, Congress did make such an expression of intent in the Title VII context. In the Civil Rights Act of 1990, which was passed by Congress but vetoed by President Bush, Congress made it clear that, although arbitration of Title VII claims was to be encouraged, Title VII claimants should not be bound

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<sup>2</sup> Gilmer contended below that the NYSE registration application was void for lack of consideration because it was signed eight days after Gilmer was hired. See *Investment Properties, Inc. v. Norburn*, 281 N.C. 191, 195, 188 S.E.2d 342 (1972) (contract must be supported by consideration); *Greene Co. v. Kelley*, 261 N.C. 166, 168, 134 S.E.2d 166 (1964) (once employment relationship exists, agreement thereafter must be in nature of new contract based on new consideration). However, this Court granted certiorari only as to the issue of whether ADEA claims in general are subject to compulsory arbitration.

by the unfavorable decision of an arbitrator. Moreover, Congress has expressly approved of the reasoning in *Alexander*. See Joint Explanatory Statement of the Committee of Conference, Conf. Rep. No. 856, 101st Cong., 2d Sess. 26 (1990):

The Conferees emphasized, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Conferees believe that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The Conferees do not intend this section to be used to preclude rights and remedies that would otherwise be available.

(Emphasis added.) Although this language refers to Title VII rather than the ADEA, the two statutes are analogous; therefore, because Congress intended to preclude binding arbitration of Title VII claims, one can assume with confidence that Congress intended the same for ADEA claims. Based on this clear expression of congressional intent, this Court should hold that ADEA claims are not subject to compulsory arbitration.

**2. Compulsory Arbitration Would Frustrate Congress' Clear Purpose to End Age Discrimination Through the Statutory Scheme It Provided in the ADEA.**

Not only has Congress clearly expressed its intent that employment discrimination claims not be subject to

compulsory arbitration; Congress has also established a statutory scheme for such claims that is inconsistent with compulsory arbitration.

In enacting Title VII and the ADEA, Congress created a detailed and unique statutory scheme clearly aimed at eliminating discrimination in employment. *Alexander*, 415 U.S. at 44, 39 L. Ed. 2d at 155-56 (Title VII). The Equal Employment Opportunity Commission ("EEOC") was created with the authority to investigate and attempt to conciliate charges of discrimination. The EEOC is authorized to institute civil actions against employers or unions. No action can be maintained under either Title VII or the ADEA unless a timely charge is filed with the EEOC. Compulsory arbitration of Title VII and ADEA claims would conflict with this statutory scheme and undermine the role of the EEOC, the agency Congress created to handle these claims.

In addition, arbitration provides an inappropriate forum for employment discrimination claims, in part because of the way arbitration works, especially arbitration under the NYSE rules.<sup>3</sup> Panels under the Rules are generally made up of a majority of "public arbitrators"

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<sup>3</sup> Since Gilmer brought this action, the NYSE has amended its rules. The amendments are reported at 54 Fed. Reg. 21144. Presumably the new rules would apply if Gilmer were to arbitrate his claim; therefore, this discussion will focus on the new rules. The changes with respect to disclosure of arbitration clauses would not apply to Gilmer, because he executed his agreement under the old rules. As will be demonstrated *infra*, the disclosure to Gilmer fell woefully short of the requirements under the new rules.



and a minority of "industry arbitrators." 54 Fed. Reg. at 21145. However, the panels hearing employment disputes are made up entirely of industry arbitrators. See NYSE Rule 632.

A panel of industry arbitrators means that a discrimination claimant is not assured an unbiased hearing. As one commentator aptly noted, "The same industry experience and expertise that makes a private arbitrator attractive as an alternative to a judge for economic claims arising under ERISA, the securities laws, and RICO may render the arbitrator in a discrimination case subject to the very biases that the Title VII plaintiff is seeking to remedy." Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 Texas L. Rev. 509, 569 (1990) (hereinafter *Shell*).

Another problem with arbitration is its much more limited discovery than provided under the Federal Rules of Civil Procedure. Although the new rules broaden the discovery that is available, see generally 54 Fed. Reg. at 21149-51, there are still significant weaknesses. Even under the new rules, taking a deposition is at the discretion of the arbitrator. *Id.* at 21150. The claimant must demonstrate that the deposition is necessary to develop his case. *Id.* In addition, the new rules, like the old, contain no specific sanctions for failure to meet discovery deadlines. *Id.* This restricted discovery enables the industry to thwart Congress' intent to redress age discrimination because the industry is more likely than the employee to have possession of relevant documents and other information. *Id.*

Moreover, in modern times discrimination has become subtle, and this subtlety of discrimination makes

liberal discovery vital to a plaintiff's case. See, e.g., *O'Brian v. Sky Chefs, Inc.*, 670 F.2d 864 (9th Cir. 1982), overruled on other grounds by *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477 (9th Cir. 1987); *Rajender v. Univ. of Minnesota*, 546 F.Supp. 158 (D. Minn. 1982). See also Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 Vanderbilt L. Rev. 905 (1978) (hereinafter *Belton*):

Employment discrimination litigation prior to Title VII presented easy and obvious targets such as explicit policies or union contracts excluding blacks from desirable jobs, segregated departments and facilities, or discriminatory pay scales. Much of the overt racial discrimination was eliminated by the Plans for Progress and state FEP Commission Activities. By 1965 overt discrimination on the basis of race was not fashionable. The forms of employment discrimination at the time Title VII became effective were far more subtle.

The more subtle brand of discrimination did not constitute the easiest target for an effective litigation campaign to eradicate the effects of job discrimination. Consequently, Title VII litigation required substantial manpower to analyze the voluminous records and extremely technical factual and legal questions involved. Proving the existence of discrimination in hiring, testing, seniority, and promotion practices proved demanding.

*Id.* at 927-28 (footnotes omitted). Discrimination is sometimes even more subtle in age discrimination cases.

The limited discovery permitted under the NYSE Rules makes subtle discrimination almost impossible to



prove. The NYSE Rules have no provision equivalent to Rule 26(b)(1) of the Federal Rules of Civil Procedure, which allows a party to discover "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The rules providing that depositions may be taken only at the discretion of the arbitrator, and the Rules' lack of provision for sanctions or other penalties for failure to comply with discovery requests, put an employment discrimination plaintiff at a severe disadvantage.

Another important difference between arbitration under the NYSE Rules and a judicial proceeding is that arbitration does not require the issuance of a written opinion. *See id.* at 21151. Of course, in a bench trial, the judge must set forth the relevant facts and the law as applied to the facts.

The absence of written arbitrators' opinions creates severe problems for age discrimination claimants. It makes appeal extremely difficult because the employee is unable to determine the grounds for the award. It is impossible to determine which facts the arbitrator considered determinative, which law the arbitrator applied, how the arbitrator applied the law, or even whether the arbitrator applied the law. In addition, the lack of a written opinion can hide a compromise award. Although this may be appropriate in routine contractual disputes, it is singularly inappropriate in employment discrimination cases, considering Congress' strong policy against discrimination in the workplace. *See, e.g.*, 29 U.S.C. § 621(b).

Finally, the lack of a written opinion means that arbitration terminates disputes "informally and silently." Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 Tulane L. Rev. 1 (1987) (hereinafter *Brunet*). The risk of adverse publicity that comes from a written opinion creates a strong incentive for employers to comply with the anti-discrimination laws, and compulsory arbitration of such claims substantially weakens that incentive.

The lack of a written opinion harms employers as well as employees. The body of employment law serves a preventive and planning function for employers. Employers use legal precedent to determine how they can best comply with the law, especially statutes with broad language like Title VII and the ADEA. "In this respect, law prevents rather than contributes to litigation." *Brunet, supra*, at 23. The lack of written opinions, if arbitration became widespread, would make it impossible for employers to determine whether their conduct in hiring, promoting, establishing seniority policies, providing benefits to employees, and making disciplinary and discharge decisions, was in compliance with the law. "As the guidance function of law is eroded by [alternative dispute resolution's] receiving a larger market share of disputes, we can anticipate additional 'disputes' arising as law loses its ability to lead or influence societal behavior." *Id.* at 23-24. Thus what in the short run seems to be a relatively inexpensive and efficient means of resolving disputes could in the long run create more uncertainty of the law and actually increase the number of disputes.

A coherent body of employment discrimination law is necessary to achieve Congress' intent of ending employment discrimination:

The emergence of a coherent body of employment discrimination law provided the necessary background for meaningful implementation of the national policy against employment discrimination. . . . The potential of multi-million dollar awards for unlawful employment discrimination emphasized that failure to comply with Title VII exposed respondents to substantial financial liability.

This coherent body of law made it possible for the federal government to negotiate settlements with AT&T, as well as nationwide settlements with the trucking and basic steel industries. Other employers and unions became more amenable to voluntary compliance agreements with the EEOC and private plaintiffs to remedy individual claims of employment discrimination and to take steps to revise employment policies to assure that similar claims would not arise in the future.

*Belton, supra*, at 950-51.

Finally, the grounds for vacating an arbitration award are extremely narrow. An arbitration award may not be set aside for a mistake in law. *Id.* n. 45. Rather, the challenger must show "manifest disregard" of the law. *Id.* at 21151. *See also id.* n. 45: "The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to pay no attention to it."

Thus, a claimant who submits to arbitration is in effect surrendering his right to appeal an adverse decision.

This scheme is completely inconsistent with Congress' intent in Title VII and the ADEA to provide "overlapping remedies" to claimants. Under the congressional scheme, a claimant under either statute must first submit his claim to his state human rights organization, if one exists. When the state proceedings terminate, the claimant may file a charge with the EEOC. If the EEOC issues a "no cause" determination, the claimant may still bring a lawsuit in the courts, with the right to appeal mistakes of law. "Title VII's overlapping system of state, federal, and administrative remedies expresses a strong congressional concern that victims of discrimination have access to multiple forums." *Shell, supra*, at 568. Arbitration, by contrast, affords a claimant only one opportunity to present his case.

The NYSE recognizes these weaknesses in arbitration, as evidenced in its new rules on pre-dispute disclosure. The new rules, which were not in effect when Gilmer signed the arbitration agreement, require that the arbitration clause be preceded by the following warnings:

[T]hat [customers] are waiving their right to seek remedies in court, that arbitration is final, that discovery is generally more limited than in court proceedings, that the award is not required to contain factual findings and legal reasoning, and that the arbitration panel typically will include a minority of arbitrators associated with the securities industry.



*Id.* at 21153. It is clear, then, that a claimant who agrees to arbitrate is giving up significant procedural rights that Congress intended to provide.

Arbitration is inadequate not only to redress individual cases of discrimination, but also to accomplish Congress' goal of addressing the systemic social ill of discrimination. "Commercial arbitration is focused too narrowly on specific transactions to give effect to the institutional goals of the ADEA." *Shell, supra*, at 572. Arbitration is "transactional" in focus, but the employment discrimination statutes are "institutional" in focus:

First, Title VII is not only a remedial statute; it is an attempt to address a systemic social ill – discrimination – that is deeply embedded in the cultural fabric. The adjudication of a Title VII claim is both an opportunity to reverse an instance of discrimination and an occasion for examining the institutions that made discrimination possible. The Court in *Alexander* recognized this aspect of Title VII when it stated that "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory practices." Commercial arbitration is not well situated to serve this institutional goal because it is essentially transactional in focus. Securities arbitrators are appointed for a single case to review a specific complaint. Their remedial powers are limited to granting or denying relief requested by the particular parties before them and do not include monitoring long-term injunctive relief or making sweeping institutional reforms.

*Id.* at 568 (footnotes omitted).

Many of the remedies that courts have used to carry out the congressional purpose behind Title VII (also appropriate in the ADEA context) are beyond the authority of an arbitrator:

The courts held that § 703(j) [42 U.S.C. § 2000e-2(j) (1970)], the so-called antipreferential treatment provision, does not preclude the imposition of quotas, goals, or timetables, as long as they are imposed to correct present effects of past discrimination or current unlawful employment practices. Appropriate seniority adjustments under a "rightful place" theory were ordered to remedy both the pre-Act and post-Act discriminatory effects of facially neutral seniority practices. Recruitment and training programs were ordered, and objective selection criteria were required to replace subjective criteria.

*Belton, supra*, at 946-47. An arbitrator, although perhaps qualified to order reinstatement and back pay, has no authority to play this institutional role in enforcing the employment discrimination statutes. *Shell, supra*, at 568.

Finally, although employment discrimination claims do have an economic component, the main focus is on personal dignity and equal protection. See *Shell, supra*, at 570 (Title VII), 572 (ADEA). These are "precisely the kinds of 'core value' questions that should be reserved for a court." *Id.* at 572.

Both because of the inadequate procedural protection it affords and because of its focus on resolving commercial disputes rather than protecting individual rights, commercial arbitration is clearly inappropriate for the resolution of employment discrimination claims. To allow compulsory arbitration of such claims would frustrate



Congress' intent to provide a judicial forum for those who are subjected to age discrimination.

### CONCLUSION

The ADEA, like Title VII, the FLSA, and 42 U.S.C. § 1983, provides minimum substantive guarantees to workers; therefore, the Court should hold that ADEA claims are not subject to compulsory arbitration. Even if the Court applies the *Mitsubishi* test, it should hold that ADEA claims are not subject to compulsory arbitration: first, Congress has clearly expressed its intent that claims under Title VII, which is analogous to the ADEA, not be subject to binding arbitration; and second, compulsory arbitration is inconsistent with the detailed statutory scheme Congress provided in the ADEA.

For the aforesaid reasons, the decision of the U.S. Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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### APPENDIX

#### § 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that -

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Pub.L. 90-202, § 2, Dec. 15, 1967, 81 Stat. 602.)

**§ 623. Prohibition of age discrimination**

**(a) Employer practices**

It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

**(b) Employment agency practices**

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

**(c) Labor organization practices**

It shall be unlawful for a labor organization -

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way

which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

**(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation**

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

**(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.**

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification



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or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

- (f) **Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause**

It shall not be unlawful for an employer, employment agency, or labor organization -

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

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- (g) **Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233**

- (h) **Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control**

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the -

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

- (i) **Firefighters and law enforcement officers attaining hiring or retiring age under State or local law on March 3, 1983**

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken -



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(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

**(i)<sup>1</sup> Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees**

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits -

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit

<sup>1</sup> So in original. Two sub secs. (i) have been enacted.

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plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan -

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution

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of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with

App. 9

respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2) of title 26.

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection -

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(As amended Pub.L. 99-272, Title IX, § 9201(b)(1), (3), Apr. 7, 1986, 100 Stat. 171; Pub.L. 99-509, Title IX, § 9201, Oct. 21, 1986, 100 Stat. 1973; Pub.L. 99-592, §§ 2(a), (b), 3(a), Oct. 31, 1986, 100 Stat. 3342; Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233.)

**§ 626. Recordkeeping, investigation, and enforcement**

**(a) Attendance of witnesses; investigations, inspections, records, and homework regulations**

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.



- (b) **Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion**

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

- (c) **Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial**

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

- (d) **Filing of charge with Commission; timeliness; conciliation, conference, and persuasion**

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed -

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as



prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

**(e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling**

(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Equal Employment Opportunity Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

(Pub.L. 90-202, § 7, Dec. 15, 1967, 81 Stat. 604; Pub.L. 95-256, § 4(a), (b)(1), (c)(1), Apr. 6, 1978, 92 Stat. 190, 191; 1978 Reorg. Plan. No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

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②  
No. 90-18

FILED

DEC 1990

JOSEPH F. SPANIO,  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1990

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ROBERT D. GILMER,

*Petitioner,*

v.

INTERSTATE/JOHNSON LANE CORPORATION,

*Respondent.*

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On Writ Of Certiorari To The  
United States Court Of Appeals For The  
Fourth Circuit

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**BRIEF ON THE MERITS FOR RESPONDENT**

---

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**QUESTION PRESENTED**

May a court in accordance with the Federal Arbitration Act, 9 U.S.C. §§ 1-15, compel arbitration of an individual claim of age discrimination brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-633a?



**PARTIES AND LIST OF  
AFFILIATED CORPORATIONS**

See page ii of Respondent's Brief in Opposition to the  
Petition.

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## STATUTORY AND OTHER PROVISIONS INVOLVED

In addition to those statutory provisions designated by Petitioner, Respondent directs the Court's attention to Rule 347 of the Rules of the Board of Directors of the New York Stock Exchange, Inc., and the Arbitration Rules of the New York Stock Exchange, Inc., all of which are set out verbatim in the Appendix to this brief.

## STATEMENT OF THE CASE

Petitioner became employed by Respondent in 1981 as a Manager of Financial Services. As required to perform the duties of his position, he registered as a securities broker with the New York Stock Exchange ("NYSE" or "the Exchange"). Petitioner was not a member of a union and, therefore, his employment was not subject to the terms of a collective bargaining agreement. Paragraph V of the registration agreement (Form U-4) submitted by Petitioner to the NYSE provides as follows: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register. . . ." (J.A. at 18.)<sup>1</sup> NYSE Rule 347 provides for the arbitration of "[a]ny controversy . . . arising out of the employment or termination of employment" of a registered securities representative. (App. 1.)

Petitioner's employment with Respondent terminated in 1987. He filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and subsequently filed his Complaint in the United States District Court for the Western District of

<sup>1</sup> Citations to "J.A." are to the Joint Appendix. Citations to "App." are to the Appendix to this brief.



North Carolina before the EEOC finished its investigation or attempted conciliation of his claim. Petitioner's Complaint presented only a single claim that his employer discharged him in violation of the ADEA. (J.A. at 4.) No other federal or state law claim (statutory or otherwise) is presented in this case; Petitioner also has not sought to initiate other legal proceedings regarding his employment with Respondent. The Complaint challenged no employment policy or practice of the Respondent that affects any other employee or applicant. The remedies Petitioner seeks are those traditionally sought in a single discharge claim; *i.e.*, individual reinstatement, backpay, and liquidated damages. Also, Petitioner seeks attorneys fees and court costs as authorized by federal law for a "prevailing party."

Interstate responded to Petitioner's federal court Complaint by filing a motion to compel arbitration of Petitioner's claim. (J.A. at 10.) The motion sought enforcement of the Petitioner's arbitration agreement as authorized by section 3 of the Federal Arbitration Act (FAA), 9 U.S.C. § 3. Although he opposed the motion, Petitioner presented no evidence before the district court that the agreement did not cover his dispute with Respondent. He also did not dispute the validity of his arbitration agreement. Indeed, Petitioner's counsel informed the district court that "I'm not alleging any fraud or anything." (J.A. at 42.) Petitioner also did not dispute evidence presented by his employer that the registration agreement containing the arbitration agreement was entered into by him as a requirement of performing the duties of his position. (J.A. at 74.) Instead, Petitioner's principal argument for avoiding arbitration has been simply that his statutory claim of age discrimination is not subject to the FAA's provisions.

The district court denied Respondent's motion and accepted Petitioner's argument that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), precluded enforcement of the arbitration agreement. (J.A. at 85.) Respondent appealed the district court's refusal to enforce the arbitration agreement to the United States Court of Appeals for the Fourth Circuit. (J.A. at 78.)

The court of appeals reversed the district court's order in an opinion dated February 6, 1990. The appeals court held that the rationale underlying this Court's decisions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917 (1989), mandated enforcement of Petitioner's written arbitration agreement and that nothing in the ADEA's text, history or purpose precluded arbitration of ADEA claims. *Gilmer v. Interstate/Johnson Lane*, 895 F.2d 195 (4th Cir. 1990). The court of appeals denied Petitioner's motion for rehearing and suggestion for rehearing *en banc* on March 28, 1990. Petitioner filed a Petition for Certiorari in this Court on June 26, 1990. The Petitioner presented two questions for review: (1) "Are claims brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), subject to compulsory arbitration?" and (2) "Is an arbitration clause executed six years before any claim arises under the ADEA an invalid prospective waiver?" On October 1, 1990, the Court granted certiorari as to the single issue of whether ADEA claims are subject to compulsory arbitration.

### SUMMARY OF ARGUMENT

This case presents the single issue of whether, under the FAA, Petitioner can be compelled to arbitrate his

ADEA claim. The Fourth Circuit in reversing the district court's denial of arbitration held that Plaintiff could be compelled to arbitrate his ADEA claim. Respondent submits that the circuit court's ruling should be affirmed.

The court of appeals determined the arbitrability of Petitioner's ADEA claim by following the analytical framework of this Court's recent decisions in *Mitsubishi v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 614 (1985), and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Those decisions resoundingly rejected the premise that statutory claims are inherently unsuited for arbitration. Instead, those cases recognized a rebuttable presumption favoring arbitrability in light of the congressional policy stated in the FAA. The FAA expressly mandates enforcement of private arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In applying this presumption to statutory claims, the Court made clear in *McMahon* that arbitration should be compelled, unless the party opposing arbitration can affirmatively demonstrate that, in enacting the statute giving rise to the claim, Congress intended to preclude a waiver of a judicial forum.

Petitioner has not met his burden of affirmatively showing that Congress intended to except ADEA claims from compulsory arbitration. He concedes that neither the text nor legislative history of the ADEA contains any reference to arbitration. Moreover, his arguments that arbitration conflicts with the inherent purpose of the ADEA fall far short of rebutting the presumption favoring arbitrability.

The *Mitsubishi - McMahon - Rodriguez de Quijas* trilogy establishes that the Court narrowly construes the type of evidence that will suffice to show a conflict

between statutory rights and arbitration. In large measure, Petitioner simply argues archaic perceptions that arbitration will not provide him with an adequate forum to pursue his statutory claim. These arguments give little regard to the well-established procedures of the NYSE that will provide the forum for his claim and simply anticipate problems that may in fact never occur. The *Mitsubishi* trilogy rejected such arguments as nothing more than the very hostility towards arbitration that the FAA was intended to overcome. Petitioner's concerns that arbitration will conflict with the statutory framework of the FAA also are unfounded. Arbitration will not diminish the EEOC's enforcement role. It also does not conflict with the jury trial option or role of the courts under the ADEA. The jury trial option in ADEA cases is one that can be waived, just as in other statutory cases where arbitration agreements have been enforced. Similarly, there is no requirement in the ADEA that courts decide all cases. Private parties are free under the statute to settle cases or to choose state courts over federal courts, all without judicial supervision. No reason exists why they should not similarly be free to agree on arbitration as the means for resolving their disputes, particularly where, as here, arbitration involves no waiver of substantive rights and will be subject to judicial review to ensure that the Petitioner's ADEA claim is given due regard in the arbitral proceeding.

Finally, Petitioner's argument, premised on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and related cases, that ADEA claims are in a special category of rights inherently unsuited for arbitration misconstrues those authorities. None of those cases dealt with the enforceability of an individual arbitration agreement. None applied the FAA's presumption favoring arbitration to the claim at issue. Instead, those cases dealt either with the



preclusive effect that should be accorded collective bargaining arbitration (a much more limited form of arbitration than available here) or with whether a statutory collective bargaining procedure provided the exclusive remedy for the wrong alleged. The issues decided were thus materially different than that presented here, and the Court's decisions in those cases are not controlling.

Amici curiae in support of Petitioner argue that the FAA does not apply to this case. They rely on language in section 1 of the Act that excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from coverage by the FAA. 9 U.S.C. §1. Petitioner never raised this argument below, nor did he petition for certiorari on this issue. The issue is thus not properly before this Court.

In any event, the amici overlook that Petitioner's arbitration agreement is enforceable under the FAA over and above any connection it has with his employment with Respondent. The arbitration agreement is enforceable as a material part of Petitioner's registration agreement with the NYSE. He is thus bound by that agreement the same as Respondent and all others who contract to do business with the Exchange are bound by the Exchange's rules, bylaws and constitution. On this basis, courts universally have held such arbitration agreements enforceable under the FAA.

The amici also construe section 1's exclusionary language far too broadly in applying it to Petitioner's arbitration agreement. Petitioner, as a professional broker and senior-level executive, does not fit within the categories of "workers" to which Congress intended the exclusion to apply.

## ARGUMENT

In this case, the Court must decide whether Congress foreclosed arbitration of Petitioner's statutory claim of age discrimination in employment or whether, instead, the strong federal policies favoring arbitration require enforcement of Petitioner's agreement to arbitrate his employment dispute. The appeals court held that Petitioner's ADEA claim is subject to compulsory arbitration and that, under the FAA, the district court should have ordered Petitioner to arbitrate that claim. The appeals court's decision dealt principally with the question of enforceability, finding in this Court's recent decisions applying the FAA a strong presumption favoring enforcement of arbitration agreements. Although recognizing that in some statutory cases the FAA's presumption of enforceability may be overcome by clear evidence of a congressional intent to preclude arbitration of the statutory claim, the appeals court found no such intent in the ADEA. Notwithstanding Petitioner's arguments here, the appeals court was correct.

### I. THE FAA REQUIRES ENFORCEMENT OF PETITIONER'S AGREEMENT TO ARBITRATE BECAUSE CONGRESS HAS NOT EXCEPTED ADEA CLAIMS FROM THE MANDATE OF THE FAA AND SUCH CLAIMS ARE NOT INHERENTLY UNSUITABLE FOR ARBITRATION.

A determination of whether Petitioner's agreement to arbitrate is enforceable as to his statutory age claim must begin with an analysis of the FAA. *McMahon*, 482 U.S. at 225. Under section 2 of the Act, Congress long ago provided that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Act requires a court to stay its



proceedings and direct the parties to resolve their dispute through arbitration whenever any suit is brought on a matter within the scope of an agreement to arbitrate. 9 U.S.C. § 3. Similarly, the Act directs a court, upon petition by an aggrieved party, to order arbitration whenever a party has failed, neglected or refused to comply with an arbitration agreement. 9 U.S.C. § 4.

This Court has recognized that "[t]he legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). The Act thus represents "a congressional declaration of a liberal federal policy favoring arbitration agreements. . . ." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The statute's terms are mandatory; it "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Byrd*, 470 U.S. at 218 (emphasis in original). Where questions of arbitrability arise under a particular agreement, such "questions . . . must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . ." *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24-25.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court held that the congressional policy favoring enforcement of arbitration agreements applies with equal force to statutory claims. The Court rejected any notion that statutory claims should be subject to a per se rule of exclusion from the operation of the FAA:

[W]e find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims.

*Id.* at 625. The Court then described the framework for determining the arbitrability of statutory claims:

[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties' agreed to arbitrate that dispute. . . . [A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.

There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights. Some time ago this Court expressed "hope for [the Act's] usefulness both in controversies based on statutes or on standards otherwise created,"<sup>2</sup> . . . and we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution. . . . Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds "for revocation of any contract."<sup>3</sup> . . . But, absent such compelling considerations, the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.

*Id.* at 626-27 (citations omitted). Where the parties' agreement encompasses the statutory claim at issue, a second inquiry arises, which is the issue presently before the

<sup>2</sup> Quoting *Wilko v. Swan*, 346 U.S. 427, 432 (1953) (footnote omitted).

<sup>3</sup> Quoting 9 U.S.C. § 2.

Court. A court must discern if "legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Id.* at 628. In making this determination, the Court explained that

it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. . . . We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

*Id.* at 627-28 (citations omitted).

Significantly, the Court rejected as unfounded any fears that the substantive rights advanced in a particular statutory claim would be lost or diminished if resolved in an arbitral, rather than a judicial, forum:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

*Id.* at 628.

Following *Mitsubishi*, this Court consistently has underscored the strong policies favoring enforcement of arbitration agreements, even as to claims involving statutory rights. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917 (1989). *McMahon* has particular significance. It expands

upon the *Mitsubishi* framework for determining the arbitrability of a particular statutory claim, and emphasizes that the party opposing arbitration must carry the burden on that question. In *McMahon*, the Court stated:

Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue . . . . If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deducible from [the statute's] text or legislative history," . . . or from an inherent conflict between arbitration and the statute's underlying purposes.

482 U.S. at 226-27, quoting *Mitsubishi*, 473 U.S. at 628. After *McMahon*, it is clear that, absent an affirmative showing that Congress specifically intended that particular statutory claims be resolved only in a judicial forum,<sup>4</sup>

<sup>4</sup> *Mitsubishi* and *McMahon* clearly hold that a congressional intent to exclude statutory claims from compulsory arbitration cannot be presumed. Rather, such an intent must be clearly demonstrated in the text or legislative history or by an inherent conflict between arbitration and the underlying purposes of the statute.

Reading *Mitsubishi*, *McMahon* and *Rodriguez de Quijas* together demonstrates that the Court narrowly construes the type of evidence that can show a congressional intent to preclude compulsory arbitration of particular statutory claims. See Note, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 Harv. L. Rev. 568, 573 (1990) (hereinafter cited as "*Harv. Note*"). This conclusion is evident in the Court's repeated affirmation of the "liberal federal policy favoring arbitration," *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24, quoted in *Mitsubishi*, 473 U.S. at 625; and *McMahon*, 482 U.S. at 226; and its unwillingness to find that a statutory framework

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courts should hold a party to his agreement to arbitrate such claims.

The Fourth Circuit correctly applied the *McMahon* analysis in this case. In determining under the FAA that Petitioner should arbitrate his age claim in accordance with his agreement, the appeals court correctly followed the dictates of *Mitsubishi*, *McMahon*, and *Rodriguez*, finding that:

nothing in the text, legislative history, or underlying purposes of the ADEA indicate[s] a congressional intent to preclude enforcement of arbitration agreements. Arbitration is nowhere mentioned in the text of the statute, and "[t]his silence in the text is matched by silence in the statute's legislative history." *McMahon*, 107 S.Ct. at 2344. Nor is there any statement on the part of Congress to indicate that a federal judicial forum is the only appropriate forum for vindication of the rights created by the ADEA. Moreover, we see no conflict between arbitration and the underlying purposes of the ADEA which would preclude arbitration of ADEA claims.

895 F.2d at 197. Significantly, at no time in the court below, nor in this Court, has Petitioner disputed the appeals court's determination that neither the ADEA's text nor its legislative history expressly forecloses compulsory arbitration. Petitioner instead has focused on

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relying on judicial procedures and remedies in and of itself indicates a congressional intent to preclude arbitration, *see, e.g., Mitsubishi*, 473 U.S. at 632-37; *McMahon*, 482 U.S. at 230-31 (rejecting argument that arbitration would weaken a plaintiff's ability to recover); *Rodriguez de Quijas*, 109 S.Ct. at 1920-21 (rejecting *Wilko v. Swan* determination that procedural rights afforded plaintiffs under the 1933 Securities Act showed a congressional intent to preclude compulsory arbitration of claims under that Act).

what he perceives to be the inadequacy of arbitration to resolve a statutory discrimination claim and on inherent conflicts that he claims exist between the ADEA's statutory framework and/or its underlying purpose and any arbitration. These arguments do not withstand scrutiny under the principles recently enunciated by this Court's opinions on the arbitrability of statutory claims.

**A. Petitioner's Arguments That Arbitration Cannot Adequately Resolve His ADEA Claim Are Neither Legally Nor Factually Sufficient To Avoid Arbitration.**

Petitioner argues at great length that arbitral procedures simply are inadequate to resolve an ADEA claim. He contends that compulsory arbitration might diminish his ability to vindicate his ADEA claim due to a variety of factors, including (i) the suspected potential bias of industry arbitrators; (ii) the suspected inexperience of arbitrators in dealing with statutory discrimination claims; (iii) the alleged unavailability of discovery; (iv) the alleged limited remedies that would be available in an arbitral proceeding; (v) the likelihood that arbitrators will not issue written opinions, thereby impairing judicial review and eliminating a source of doctrinal development under the Act; (vi) the limited grounds for vacating an award; and (vii) the purported narrow transactional focus of arbitral proceedings. Petitioner's argument falls far short of what the *McMahon* analysis requires under the FAA to deny enforcement of a valid agreement to arbitrate.

**1. Petitioner's Policy Arguments About The Adequacy Of Arbitration To Resolve A Statutory Claim Are Not Legally Sufficient To Avoid Enforcement Of His Agreement.**

Viewed candidly, Petitioner's arguments evidence only policy judgments that are premised on suspicions



and fears about arbitration as a mechanism for dispute resolution. This Court's recent decisions make clear that it no longer accepts such generalized objections as adequate bases upon which to deny arbitration of disputes, statutory or otherwise. *Mitsubishi*, 473 U.S. at 627. In fact, the Court has gone further to endorse the *prompt* enforcement of valid arbitration agreements, noting that objections such as those raised by Petitioner here may be better resolved at the award-enforcement stage.<sup>5</sup>

In *Mitsubishi*, for example, an amicus argued that the matter should not be sent to arbitration because the arbitral panel might misapply the law. It thereby presented a question about the "competency" of the panel to decide statutory issues. In rejecting this argument, the Court stated:

We . . . have no occasion to speculate on this matter *at this stage in the proceedings*, when *Mitsubishi* seeks to enforce the agreement to arbitrate, *not to enforce an award*.

473 U.S. at 637 n.19 (emphasis added). The Court's observation is significant in that it underscores the obvious: there is no present need to resolve what may – but has not yet – become an objection to one or even several part(s) of a future arbitration.

The Court similarly emphasized in *Mitsubishi* that adequate safeguards were present *after* the arbitration to

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<sup>5</sup> In November 1988 Congress amended the FAA to clarify when lower courts' orders involving enforcement of arbitration agreements are appealable. See 9 U.S.C. § 15. While an order denying enforcement of an arbitration agreement is immediately appealable under this section, an order enforcing such an agreement is appealable only after arbitration has been completed. Compare § 15(a) with § 15(b). This amendment underscores the priority Congress places on prompt enforcement of such agreements. See *Jeske v. Brooks*, 875 F.2d 71 (4th Cir. 1989) for a proper application of this recent amendment.

ensure that the procedure adequately addressed the statutory claims:

Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity *at the award-enforcement stage* to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.

*Id.* at 638 (emphasis added). Implicit in the Court's observation is that speculation about potential problems does not aid resolution of the present inquiry on enforceability.

Other language in *Mitsubishi* further demonstrates that the Court is not inclined to prejudge the adequacy of a particular arbitral procedure in deciding whether to enforce an arbitration agreement. For example, the Court rejected concerns that antitrust claims had never before been resolved in an international arbitral tribunal, observing that

the potential of these [arbitral] tribunals for efficient disposition of legal disagreements arising from commercial relations *has not yet been tested*. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration. . . ."

*Id.* at 638 (citation omitted; emphasis added). The Court also addressed an objection that arbitrators familiar with national law may not be available on the international arbitral tribunal that would hear the dispute. The Court rejected that objection, again articulating its clear preference that the arbitral proceeding be given a chance to deal with the issue:

[A]daptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account *when the arbitrators are appointed*. . . .

*Id.* at 633 (emphasis added).

In sum, the Court's approach in these cases has been to effectuate Congress' intention that arbitration agreements be liberally enforced under the FAA. In so doing, it consistently has discouraged just the type of policy judgments about arbitration that Petitioner advances here. See Note, *To Arbitrate Or Not To Arbitrate? The Protection of Rights Under The Age Discrimination In Employment Act*, 1988 Journal of Dispute Resolution 199, 217 ("The clear mandate in *Mitsubishi* is that it is the intent found in the text of the statute [giving rise to the claim], not the logical conclusions of the courts regarding the adequacy of arbitration, that is determinative."). Thus, the Court has demonstrated its preference that the courts enforce valid arbitration agreements. Particular objections to specific procedures or arbitrators are better resolved at the award-enforcement stage, after an adequate record has been compiled on which objections, if any, can be evaluated.

This approach simply applies common sense. A court too often is faced with an inadequate or nonexistent record to decide these questions at the threshold when it is deciding whether the arbitration agreement should be enforced at all. Justice Frankfurter's dissent in *Wilko v. Swan*, 346 U.S. 427, 439 (1953), in which the Court denied enforcement of an arbitration agreement as to 1933 Securities Act claims, supports this point. Justice Frankfurter noted that the majority decision did not rest on any evidence, either, "in the record . . . [or] in the facts of which [the Court could] take judicial notice" in concluding "that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled."<sup>6</sup>

<sup>6</sup> Recent decisions of this Court have cited Justice Frankfurter's comments approvingly. See *McMahon*, 482 U.S. at 231, and *Rodriguez de Quijas*, 109 S.Ct. at 1921.

These same weaknesses exist in Petitioner's arguments here. As the discussion which follows shows, there is no record, nor any facts of which a court could take judicial notice, showing that the NYSE arbitration procedures available to Petitioner will prove inadequate to resolve his ADEA claim. Petitioner therefore cannot rebut the presumption favoring arbitration. He therefore should be required "to honor [his] bargain," *Mitsubishi*, 473 U.S. at 640, citing *Alberto-Culver Co. v. Scherk*, 484 F.2d 611, 620 (7th Cir. 1973) (Stevens, J., dissenting), *rev'd*, 417 U.S. 506 (1974), by exhausting arbitration first and then – if needed – seeking judicial relief based on any inadequacies that he believes affects the outcome.

## 2. The Arbitral Procedures Applicable To Petitioner's ADEA Claim Provide A Sound And Fair Method For Resolving His Claim On Its Merits.

Petitioner's "suspicions" about the adequacy of arbitration represent nothing more than the same old hostility to arbitration that the FAA was intended to overcome, and that this Court has consistently rejected as a basis for refusing to enforce arbitration agreements. See *Mitsubishi*, 473 U.S. at 625-27 & 632-38; *McMahon*, 482 U.S. at 229-32. In *McMahon*, this Court observed that such suspicions, which had formed the underpinning for the Court's decision in *Wilko*, had largely been abandoned by the Court's more recent decisions:

[M]ost of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims nonarbitrable. In *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. . . . Likewise, we have concluded that the streamlined procedures of arbitration



do not entail any consequential restriction on substantive rights. . . . Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.

482 U.S. at 232 (citations omitted).

That Petitioner's suspicions have no foundation in fact or law in the present case is clear. For instance, no basis exists for *assuming* that arbitration panels selected under the NYSE Arbitration Rules to hear employee-member disputes will be biased in favor of industry employers.<sup>7</sup> In any event, this Court has rejected this assumption as a legitimate basis for denying arbitration of statutory claims. *See Mitsubishi*, 473 U.S. at 634. In *Mitsubishi* the Court observed that the parties and the arbitral body administering the proceeding will have input in the selection of the arbitrator and should be able to ensure bias does not creep into the process. *Id.* Accordingly, the Court stated, "We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Id.*

Ample checks and balances certainly exist in the NYSE procedures to ferret out potentially biased arbitrators. *See* Rules 608, 609, and 610 of the NYSE Arbitration

<sup>7</sup> Although Plaintiff argues that the NYSE Arbitration Rules provide that a panel for an intrafirm dispute will be composed of industry arbitrators, the rules do not contain such a requirement. In fact, employee-member disputes typically are heard by panels consisting of a majority selected from public or non-industry arbitrators. *See* Brief of Amicus Curiae Securities Industry Association at text accompanying note 8.

Rules (App. 9-11). These rules include very detailed disclosure requirements that arbitrators must follow and that will provide facts from which the possible bias of any arbitrator can be assessed.<sup>8</sup> The FAA also provides that bias of an arbitrator is a basis upon which any party may ask a district judge to overturn an arbitrator's award. 9 U.S.C. § 10(b).<sup>9</sup>

Similarly, Petitioner's argument that arbitrators selected under NYSE rules will prove unable to resolve ADEA claims and unable to apply applicable law is unsubstantiated. Here again, the parties and the arbitral authorities will be able to ensure that qualified arbitrators<sup>10</sup> are found to decide the case. *See Mitsubishi*, 473 U.S. at 633-34. Moreover, because the Petitioner can be represented by counsel, Rule 614 (App. 16), counsel can

<sup>8</sup> The failure of an arbitrator to make an adequate disclosure of facts relevant to assessing his or her impartiality may be grounds to set aside any award rendered by that arbitrator. *Andros Compania Maritima v. Marc Rich & Co., A.G.*, 579 F.2d 691 (2d Cir. 1978).

<sup>9</sup> Authority also exists that the district court, in enforcing an arbitration agreement under the FAA, may compel the appointment of a neutral arbitrator whenever any legitimate question exists as to the impartiality of the arbitrator(s) provided by the parties' agreement. *See Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067-68 (2d Cir. 1972).

<sup>10</sup> Really, nothing more would be required than experienced lawyers. Such a choice would ensure that the arbitrators are capable of understanding the basic legal concepts that apply in an ADEA case. *See* Judge Wilkinson's comments below, 895 F.2d at 201 (courts should not be deluded "into thinking that the ultimate question in ADEA cases is of a type which only federal judges are capable of resolving"); *cf. McMahon*, 482 U.S. 239-40 (no reason to suppose RICO claims too complex for arbitral resolution); *Mitsubishi*, 473 U.S. at 633 (potential complexity of statutory antitrust claims not enough to preclude arbitration).



ensure that the legal principles applicable to a particular claim will be adequately presented to the arbitrators. In any event, arbitrators' actions on a particular case are always subject to review. As noted above in *McMahon*, there simply is "no reason to assume . . . that arbitrators will not follow the law. . . ." 482 U.S. at 232 (emphasis added). In any event, an arbitrator's imperfect execution of his duties or manifest disregard of applicable law remains a valid reason for a district court, upon reviewing the arbitrator's award, to vacate the arbitrator's decision. See discussion *infra* at 24-25.

Arbitration under NYSE rules also provides Petitioner with ample opportunity to develop and present his claim. The NYSE's recently amended rules provide for expanded discovery and are more than sufficient for Petitioner to develop his claim. See Rule 619 (App. 17-21). See also *SEC Order Approving Proposed Rule Changes By New York Stock Exchange, Inc., Nat'l Ass'n of Sec. Dealers, Inc., and the American Stock Exchange, Inc., Relating to the Arbitration Process and the Use of Pre-dispute Arbitration Clauses*, 54 Fed. Reg. 21144, 21149-51 [hereinafter cited as "*SEC Order*"]. While Petitioner complains that taking a deposition depends on obtaining an arbitrator's approval, such approval should not be difficult to obtain,<sup>11</sup> particularly where, as in most employment cases, a claimant will likely be able to demonstrate that the evidence sought is

<sup>11</sup> In approving recent revisions to NYSE's discovery rules, the SEC noted that "[t]he SRO's . . . have explicitly recognized the appropriateness of depositions in particular circumstances. Under the proposed rule changes, arbitrators may order depositions when appropriate." *SEC Order*, 54 Fed. Reg. at 21149. It then stated, "The Commission's approval of this portion of the discovery rule is based on our clear understanding that depositions will be available as a matter of routine to parties in appropriate cases." *Id.* at 21150 (emphasis added).

pertinent to his claim. In any event, this argument focuses on only one aspect of the arbitration procedure. A proper analysis must focus on the entire procedure and its fairness to the parties, not just upon an isolated discovery procedure.

By the time the arbitration hearing begins, Petitioner also will have received a detailed, written answer from Respondent, who is obligated by the NYSE rules to set forth all relevant facts on which it will rely in defending the claim. Rule 612 (App. 12). Respondent will also have produced, at least ten (10) days before the hearing, all documents it intends to use at the hearing, thereby affording Petitioner ample opportunity to become familiar with those documents and to prepare any needed response. Rule 619(c) (App. 19).

For the hearing, an arbitrator or any counsel may subpoena witnesses to the extent provided by law. Rule 619(f) (App. 20). See also 9 U.S.C. § 7 ("The arbitrators selected, . . . or a majority of them may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case."). The arbitrators also may compel attendance by any member employee and/or the production of any records in the possession or control of any member company or its employees. Rule 619(g) (App. 20-21). Because formal evidence rules do not apply, the Petitioner will have considerably more latitude in presenting his claim than might be the case in court. Rule 620 (App. 21).

Although the AARP complains that arbitration will preclude the prosecution of class actions, Brief Amicus Curiae of AARP, at 18, that argument has no bearing on this case. Petitioner's claim has never been anything but

an individual one;<sup>12</sup> thus, the availability or unavailability of a class action has no bearing on whether arbitration is sufficient to resolve his claim.

Petitioner's claim that arbitration will unduly restrict the relief a discrimination claimant can recover also has no merit. The rules impose no limitation on the relief a panel may award Petitioner. Unlike the collective bargaining context found controlling in *Alexander*, in which the arbitrator may be limited to providing only relief allowed by a union contract, the NYSE rules do not restrict arbitrators from fully remedying any violation of law they may find. Cf. Rule 627(e) (App. 24).<sup>13</sup>

<sup>12</sup> In any event, nothing in the NYSE arbitration rules would preclude a claimant from pursuing even a class action, seeking class-wide relief. At least one commentator has observed that, with some amount of judicial supervision, class arbitrations are feasible. See Note, *Classwide Arbitration and 10b-5 Claims In the Wake of Shearson/American Express, Inc. v. McMahon*, 74 Cornell L. Rev. 380, 395-406 (1989). See also *Nicholson v. CPC Internat'l, Inc.*, 877 F.2d 221, 240-41 (3d Cir. 1989) (Becker, J., dissenting) ("arbitrations may in fact go forward as class actions"); *Harv. Note* at 575. NYSE Rules were recently again amended to liberalize procedures for a collective proceeding. See 55 Fed. Reg. 38181 (Sept. 17, 1990). In such cases, Rule 612(d) now permits a collective proceeding similar to that available under the ADEA. Cf. 29 U.S.C. §§ 626(b) & 216(b).

<sup>13</sup> If that means ordering the elimination of a pattern or practice of discriminatory behavior that adversely affected the Plaintiff, or a class of similarly situated co-claimants, the arbitrators are able to do so under the statute (the ADEA) they will be charged with applying and under the broad equitable powers historically found to reside in arbitrators. See *Nicholson*, 877 F.2d at 240 (Becker, J., dissenting).

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Although Petitioner and various amici complain that the record in an arbitration is too cursory to permit an adequate review of the proceeding or of the reasons behind a particular award, their objections do not apply here. Appropriate procedures exist under NYSE Arbitration Rules to ensure a court can adequately review the results of the proceeding. Thus, the rules, as recently amended, require that a verbatim record be maintained. Rule 623 (App. 22).<sup>14</sup> The new rules also require that

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Both *Mitsubishi* and *McMahon* also indicate that arbitral forums can provide statutory damages. In each case, the Court held that statutory treble damages could be pursued adequately through arbitration. *McMahon*, 482 U.S. at 242; *Mitsubishi*, 473 U.S. at 635. Petitioner here should likewise be able to pursue his statutory liquidated damages claim in the arbitral forum to the extent he can sustain a claim for a willful violation. Arbitrators certainly have not hesitated to award such punitive amounts in other contexts. See *Willis v. Shearson/American Express, Inc.*, 569 F. Supp. 821, 824 (M.D.N.C. 1983); Siconolfi, *Blow to Brokers: Stock Investors Win More Punitive Awards in Arbitration Cases*, Wall St. J., June 11, 1990, at 1, col. 1. There is no reason for any different rule in the employment context.

Furthermore, a prevailing ADEA claimant could recover his or her costs and attorney's fees following a favorable arbitral award, whether or not granted by the arbitrators. As a prevailing party, the claimant probably could request and receive such an award from the district court at the award-enforcement stage. Cf. *New York Gaslight Club, Inc. v. Carey*, 477 U.S. 54 (1980) (prevailing party in state administrative proceeding entitled to fee award under Title VII).

The FAA, of course, also provides that the district court may vacate [§10(d)] or modify [§11(c)] any incomplete or imperfect award. Those provisions grant the district courts the authority to ensure that a complete remedy is provided.

<sup>14</sup> The SEC Order approving the new rule notes that "the SRO proposals would assure the preservation of a record of

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arbitrators issue their award in writing, stating, *inter alia*, the issues resolved and the relief awarded. Rule 627(e) (App. 24). The ability of a district court to review such an award is commensurate with its ability to review a jury verdict. Just as with a jury trial in federal court, NYSE rules do not require preparation of findings of fact and conclusions of law.

Once the matter is brought before a court at the award-enforcement stage, the court can ensure that the Petitioner's statutory rights were given due consideration. The FAA clearly authorizes a district court to ascertain whether the arbitrators ignored applicable law, deprived the parties of a fair hearing, or rendered a decision tainted by bias. 9 U.S.C. § 10. If a court finds such improprieties, the court may vacate the award. This availability of judicial review certainly suffices to ensure that the Petitioner's ADEA rights will not be lost, or even limited, by the arbitral process to which he agreed. The Court recognized as much in *Mitsubishi*. In rejecting concerns that statutory antitrust claims may be lost if confined to an international arbitral forum, the Court observed that

[h]aving permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust law has been addressed. . . . While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.

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each arbitration proceeding and therefore facilitate an appropriate court review." SEC Order, 54 Fed. Reg. at 21151.

473 U.S. at 638. See also *id.* at 637 n.19 (noting that Court "would have little hesitation" condemning a refusal to apply applicable law as against public policy).

Finally, Petitioner's concerns that arbitration of age claims may retard doctrinal development and impede the role of an ADEA plaintiff as a "private attorney general" also have no merit. Initially, Petitioner ignores the continuing authority of the EEOC to pursue any cases it believes to be in the public interest and to promulgate regulations. Secondly, Petitioner overlooks that by pursuing an ADEA claim, whether in an arbitral or judicial forum, Petitioner and other claimants advance the remedial and deterrent functions of the ADEA. In *Mitsubishi*, the Court rejected similar concerns, noting that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 637 (emphasis added). The recently amended NYSE rules also assure that awards will be publicized, thus furthering both the deterrent impact a favorable employee award will have on future actions of the particular defendant and other employers and the development of precedent which may guide future decisions. See Rule 627(f) (App. 24).

In short, Petitioner's concerns about the adequacy of arbitration as a means of resolving his ADEA claim are nothing more than erroneous speculation. They cannot warrant an across-the-board refusal to enforce arbitration agreements that encompass ADEA or other statutory claims. This Court has repeatedly rejected such assumptions as sufficient to deny enforcement of arbitration agreements as to other statutory rights. Thus, in *McMahon*, the Court, in rejecting *Wilko's* restrictive approach to arbitrations, observed:

[T]he reasons given in *Wilko* reflect a general suspicion of the desirability of arbitration and



the competence of the arbitral tribunals – most apply with no greater force to the arbitration of securities disputes than to the arbitration of legal disputes generally.

482 U.S. at 231. The approach should be no different here. The concerns enumerated by Petitioner are best dealt with on a case-by-case basis by judicial review of the particular arbitration in which they truly arise. The mere possibility that such problems may arise, though, is not a proper basis for refusing to give the arbitral process a chance to work, particularly in light of Congress' strong mandate that the courts liberally enforce arbitration agreements.

**B. Petitioner's Concerns About The Relative Bargaining Powers Of The Parties Are Not A Proper Basis For Denying Arbitration.**

Petitioner argues that enforcement of his arbitration agreement will result in widespread imposition of such agreements on similar claimants, many of whom allegedly may have little or no bargaining power to resist such terms. This argument suffers from the same fault that undermines Petitioner's other arguments: it argues for a per se rule of exclusion when there is no evidence in this record that would justify such a ruling.

As one commentator has observed, "[t]raditional contract doctrines rather than a per se rule of unenforceability are the appropriate means of addressing the problem of adhesion contracts." *Harv. Note* at 576. The FAA expressly provides the means for deciding this issue, where it truly arises, on a case-by-case basis. Section 2 of the FAA provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 4 further provides for a summary jury trial if, in a proceeding to enforce the agreement, it appears that the making

of the agreement is at issue. *Id.* § 4.<sup>15</sup> These provisions thus indicate that a party opposing arbitration on this ground must come forward with evidence as to his or her agreement warranting a denial of enforcement under traditional contract law principles. They are inconsistent with applying per se rules of exclusion.

*Mitsubishi* and *McMahon* confirm this approach. In *Mitsubishi*, the Court refused to foreclose arbitration on the assumption that contracts generating antitrust disputes are typically contracts of adhesion. The clear thrust of the Court's reasoning was that the party claiming that the arbitration clause is tainted must prove that point. The Court thus stated that "absent such a showing – and none was attempted here – there is no basis for assuming the forum inadequate or its selection unfair." 473 U.S. at 633. Similarly, in *McMahon*, the Court approved the arbitration of 1934 Exchange Act claims, rejecting the allegation that predispute agreements applicable to such claims should be void because "they tend to result from broker overreaching." 482 U.S. at 230, 231. The Court held that such argument, instead, should be raised as a ground for revoking a particular agreement, using "ordinary" principles of contract law"; it was not, however, deemed a ground for holding all such contracts void. *Id.* Both decisions thus demonstrate that arguments for invalidating arbitration clauses must be addressed to the facts of each particular case and should not be premised on assumptions about the "type" of claim or "type" of arbitration agreement involved.

<sup>15</sup> Under this Court's opinion in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this procedure comes into play only when the validity of the arbitration clause itself is at issue. If the validity of the whole agreement containing the arbitration provision is challenged, that issue must be decided by the arbitrator. *Id.*

When analyzed under this approach, the record in this case reveals no evidence warranting a refusal to enforce the arbitration agreement. In the first place, the arbitration provision was not "forced" on Petitioner by Respondent; rather, Petitioner agreed to arbitration in conjunction with his registration with the NYSE. In that context "the arbitration rule is a reasonable exercise of the self-regulatory power vested in the Exchange, 15 U.S.C. § 78a, *et seq.*, and is not void as adhesive." *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 587 F. Supp. 1520, 1523 (N.D. Ga. 1984).

Secondly, the Court should note that Petitioner is an experienced businessman,<sup>16</sup> who long has worked under registration agreements like that containing the arbitration agreement at issue here. (J.A. at 22.) There is no evidence that he was misled into agreeing to arbitrate his employment disputes with Respondent. In fact, his counsel notified the district court that Petitioner was "not alleging any fraud or anything." (J.A. at 42.) Accordingly, the court of appeals correctly noted that Petitioner "has never asserted that his waiver [of the judicial forum] was anything other than knowing and voluntary. . . ." 895 F.2d at 200. When this Court denied certiorari on this question, that ended the issue in this case.

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<sup>16</sup> These facts thus present a peculiarly strong basis for enforcing the agreement. See Waks & Ginsberg, *Arbitrating Executive and Other Employment Disputes: Let's Put a Pin in Gardner-Denver!*, reprinted in Proceedings of New York University's 43rd National Conference on Labor, 62 (Little Brown, to be published December 1990) ("Especially where executive employees are involved, sophistication should be presumed . . .").

**C. The Fourth Circuit Correctly Ruled That Arbitration Would Not Conflict With The Statutory Enforcement Scheme Established By The ADEA.**

Petitioner argues that the ADEA's enforcement framework itself evinces a congressional intent at odds with requiring an age claimant to pursue his claim through arbitration. As the Fourth Circuit correctly held, this argument has no merit. Petitioner points to aspects of the statute such as the role of the EEOC, the role of the courts in deciding ADEA cases, and the availability of a jury trial as indicating that Congress intended these cases to be resolved exclusively through a judicial forum. The court of appeals' thorough analysis of these arguments cogently explains why none of these attributes of the statute show a congressional intent to preclude arbitration of age claims.

The appeals court found no reason to suspect that the EEOC's role would be diminished. Whatever happens here, the EEOC retains its plenary authority to investigate and prosecute appropriate age claims. See 29 U.S.C. §§ 626(a) & 211(a). The EEOC is not foreclosed from its statutory role by any determination made in a private arbitration. Thus, submission of Petitioner's ADEA claim to arbitration does not preclude the EEOC from investigating his claim and, similarly, will have no limiting effect on the EEOC's investigation or prosecution of other ADEA claims. Moreover, because the EEOC remains available to act on behalf of an aggrieved employee, an individual age claimant bound by a private arbitration agreement remains free to file charges or complaints with the EEOC, thereby supplementing the Commission's statutory investigative, conciliation and litigation roles. See generally *Harv. Note* at 573-74. Rather than conflicting with arbitration as a means of resolving ADEA claims, the continuing statutory role of the EEOC under the ADEA



provides an additional safety net that may not have been available in other cases where this Court upheld compulsory arbitration of statutory claims.

The jury trial option under the ADEA and the judiciary's role in the Act's enforcement scheme also were properly rejected by the appeals court as evidence of a congressional intent to foreclose compulsory arbitration of Petitioner's age claim. As the appeals court recognized, the option of a jury trial is one that can be freely waived; in no sense is it the exclusive manner of proceeding for resolving an age claim. 895 F.2d at 199, citing *Washington v. New York City Board of Estimate*, 709 F.2d 792, 797-99 (2d Cir. 1983), cert. denied, 464 U.S. 1013 (1983); *Scharnhorst v. Independent School Dist. #710*, 686 F.2d 637, 641 (8th Cir. 1982), cert. denied, 462 U.S. 1109 (1983). Similarly, the court of appeals recognized that while the ADEA provides for a trial *de novo* in federal court, that provision

says nothing about Congress' attitude toward arbitration [of age cases]. Unlike either courts or agencies, arbitration is a forum selected by mutual agreement of the parties. Congress' choice of an enforcement scheme in which ADEA suits are brought in a judicial forum simply does not manifest an intention to prevent parties from reaching a private contractual agreement to submit their disputes to arbitration.

895 F.2d at 199.

In this respect, the ADEA's enforcement scheme is no different than those provided for the statutory claims considered in *Mitsubishi*, *McMahon* and *Rodriguez de Quijas*. Each case involved a claim that, by statute, was triable in a federal jury proceeding. Yet, this Court rejected this fact as a reason for denying arbitration of those statutory claims.

*Rodriguez de Quijas* is particularly compelling in this regard. The 1933 Securities Act, like the ADEA, provides for concurrent jurisdiction in state and federal court. The court found that this jurisdictional flexibility

would suggest that arbitration agreements which are, "in effect, a specialized kind of forum-selection clause," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 2457, 41 L.Ed.2d 270 (1974), should not be prohibited . . . since they, like the provision for concurrent jurisdiction, serve to advance the objective of allowing buyers of securities a broader right to select the forum for resolving disputes, whether it be judicial or otherwise.

109 S.Ct. at 1921.

The same rationale applies to a claim under the ADEA. Not only does the ADEA allow the same flexibility of concurrent jurisdiction in state and federal courts, see 29 U.S.C. §§ 626(b) & (c)(1), 216(b), it goes further to express a strong preference for conciliation as a means of resolving disputes under the Act, *id.* § 626(b) & (d). An employee, therefore, clearly has the freedom to choose forums other than federal courts for resolving an age claim by a private agreement. As the appeals court recognized, "Congress clearly did not intend that all ADEA disputes be resolved in federal court; rather, it contemplated a more flexible scheme for the resolution of individual ADEA claims." 895 F.2d at 200.<sup>17</sup> Compare

<sup>17</sup> Indeed, the ADEA does not state that only a jury can resolve such claims. The fact that a private ADEA plaintiff remains free to settle his claim at any time demonstrates that fact. Compare the Court's analysis in *Mitsubishi*:

And, of course, the antitrust cause of action remains at all times under the control of the individual litigant: no citizen is under an obligation to bring an

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section 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a), where Congress explicitly stated that arbitration agreements cannot preclude the NLRB from deciding unfair labor practice cases.

Apparently realizing that nothing in the existing language of the ADEA precludes arbitration, Petitioner points to a recent legislative proposal, which he contends implicitly establishes that Congress disfavors binding arbitration of such claims. The proposed, but not enacted, Civil Rights Act of 1990 contained a provision encouraging arbitration and other means of alternative dispute resolution "[w]here appropriate and to the extent authorized by law. . . ." Section 18 of the (proposed) Civil Rights Act of 1990, *reprinted in Conf. Rep. On Civil Rights Act of 1990*, H.R. Doc. No. 101-856, 101 Cong., 2d Sess. (1990). If this unenacted legislation is to be given any consideration here, its clear language supports Respondent's position and the appeals court's analysis and ruling in this matter: *i.e.*, under existing law, such claims are arbitrable. Nonetheless, Petitioner argues that a Conference Committee's explanatory statement supports an opposite meaning. That explanation states:

The Conferees emphasize . . . that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Conferees believe that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief

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antitrust suit, . . . and the private antitrust plaintiff needs no executive or judicial approval before settling one.

473 U.S. at 636.

under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

*Joint Explanatory Statement of the Committee of Conference, reprinted in Conf. Rep. On Civil Rights Act of 1990*, H.R. Doc. No. 101-856, 101 Cong., 2d Sess. (1990), at 20 (emphasis added.)

Petitioner's reliance on the Committee's explanatory statement hardly supports his argument against enforcement of his arbitration agreement in this case. In the first place, after-the-fact pronouncements by Congress cannot provide legislative history relevant to divining Congress' intent at the time it passed the ADEA. *See Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir. 1980), *cert. denied*, 449 U.S. 889 (1980). Secondly, the explanatory statement conflicts with the plain language of the proposed amendment, which encouraged the use of arbitrations under the civil rights laws *without restriction*. Legislative history that conflicts with unambiguous language in a statutory enactment should not be permitted to change the meaning of the language actually used in the proposed legislation. *See United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977); *United States v. Oregon*, 366 U.S. 643, 648 (1961). Thirdly, the fact remains that the Civil Rights Act of 1990 never passed. The bill and its accompanying legislative materials thus represent little more than filler-material for the *Congressional Record* at this point.

Perhaps most significantly, though, Petitioner overlooks that the explanatory statement voices an opinion *solely* about the arbitration of Title VII claims. It in no way endeavors to provide an interpretation that would have precluded, or even limited, the arbitration of ADEA claims, even though section 18 of the Conference bill plainly addresses the use of arbitrations, and other means of alternative dispute resolution, in resolving "disputes

arising under *the Acts* amended by this Act." Section 18, Civil Rights Act of 1990 (Conference Committee bill) (emphasis added). The ADEA was one of "*the Acts*" that would have been amended by the Civil Rights Act of 1990. Thus, if anything, the explanatory statement, by its own limitation to Title VII, suggests that arbitration of an ADEA claim is acceptable to the Conference Committee.

Other recent legislation may supply some guidance on Congress' attitude on this subject. Title II of the recently enacted Older Workers Benefits Protection Act ("OWBPA"), Pub. L. 101-433, establishes standards that must be satisfied in order to effectuate a waiver of substantive rights under the ADEA. Although Congress passed this Act at about the same time it considered the proposed Civil Rights Act of 1990, and specifically dealt with the issue of waivers under the ADEA, Congress voiced no concern about the use of binding arbitration to resolve ADEA claims. Notably, although the Fourth Circuit's *Gilmer* decision was published at that point, Congress made no effort to note its disagreement with *Gilmer* anywhere in the text or Committee Reports on the OWBPA. Nowhere in the Act, or the legislative history of that Act, does Congress even address the topic of arbitrations or mandate a judicial forum for such cases. It easily could have done so. Thus, while the OWBPA clearly has only prospective application and no impact on this case, it indicates Congress has no real concern with the Fourth Circuit's decision in this case. See *Harv. Note* at 577 n.71.

That Congress never has endeavored to preclude or limit application of the FAA according to the type of claim involved also is significant. Although the FAA has been amended on several occasions, see Pub. L. 91-368, 84 Stat. 693 (1970); Pub. L. 100-702, 102 Stat. 4671 (1988), no subject matter exceptions have been written into the Act. Congress clearly has the power to except certain types of

claims from the FAA. Where it has not done so, reading such exceptions into the Act based on "policy" considerations would run contrary to Congress' clear intention in the FAA that arbitration agreements be liberally enforced. Compare the Court's analysis in *Mitsubishi*, 473 U.S. at 639 n.21, where Congress' amendment to the FAA in Pub. L. 91-368, 84 Stat. 692 (9 U.S.C. §§ 201-08), led the Court to observe "Congress did not specify any matters it intended to exclude from its [FAA's] scope." Clearly Congress has not so limited the FAA; thus Congress apparently has been satisfied with the Court's implementation of its "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24.

#### **D. Alexander, Barrentine, McDonald and Buell Do Not Preclude Arbitration of ADEA Claims.**

Lastly, Petitioner argues that the Fourth Circuit's decision conflicts with this Court's earlier decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 466 U.S. 284 (1984); and *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987). Petitioner misreads these cases as supporting his argument that his individual ADEA claim cannot be arbitrated.

*Alexander*, *Barrentine*, *McDonald* and *Buell* are obviously distinguishable from the present case in that none of these cases involved the *enforcement* of a written individual agreement to arbitrate that would have encompassed the statutory claims at issue in those cases. *Alexander*, *Barrentine* and *McDonald* all focused on whether a prior arbitral award was *preclusive* of particular statutory claims. Each decision probably needed to go no further than its recognition that the statutory claims were



not decided in the collective bargaining arbitration that preceded the court action. In fact, the Court recognized in each case that the statutory claim could not have been decided by the labor arbitrators, since each arbitrator's authority was clearly limited to interpreting and applying the terms of the various collective bargaining agreements. The issue of preclusion is not presented at all in this case. This case involves only the threshold question of whether the court should enforce an individual arbitration agreement. The issue of preclusion should await completion of the arbitration. The district court then can determine what preclusive effect the award may have vis-a-vis any federal statutory claim. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. at 224 ("there is no reason to require that district courts decline to compel arbitration . . . simply to avoid an infringement of federal interests").<sup>18</sup>

*Buell* similarly dealt with a different issue than the enforcement of an individual agreement to arbitrate that would have covered the statutory claim. That case resolved whether the Railway Labor Act ("RLA") provided the exclusive remedy for the plaintiff's FELA claim. The Court held that the RLA procedures were not the plaintiff's exclusive remedy. The Court noted that FELA provided the plaintiff with a damages claim for "negligent conduct that is independent of the employer's obligations under its collective bargaining agreements. . . ." 480 U.S. at 565. The "minor dispute" provisions of the RLA, on the other hand, did not address the damages issue presented by the plaintiff's FELA claim. Since the

<sup>18</sup> *Byrd* predates the *Mitsubishi - McMahon - Rodriguez* trilogy and thus does not fully recognize the arbitrability of federal statutory claims as do those subsequent decisions. Nonetheless, it supports the proposition that determinations of preclusive effect ordinarily should await completion of the arbitral proceeding.

RLA did not provide the means to resolve the plaintiff's FELA claim, the Court found no conflict between the RLA and FELA warranting a ruling that the RLA repealed any part of FELA. *Id.* at 566-67. Thus, the Court's holding in *Buell* is limited by the same fact that was sufficient to resolve *Alexander*, *Barrentine* and *McDonald*: i.e., because the statutory claim could not be fully resolved by the collective bargaining agreement procedures available to the plaintiff, he was not precluded from pursuing his statutory claim in court.

In this case, Petitioner clearly can present his statutory claim in the arbitral forum and that forum is equipped to resolve the claim. Thus *Alexander*, *McDonald*, *Barrentine*, and *Buell*, should not preclude enforcement of the agreement to arbitrate at issue here.

Equally significant in the *Alexander* line of cases is the total absence in those cases of any discussion or consideration of the FAA or the strong public policy favoring enforcement of individual arbitration agreements under the FAA.<sup>19</sup> Petitioner focuses, however, on the fact that *Buell* was decided after *Mitsubishi*, yet still excepted the statutory employment claim at issue in that case from the "minor dispute" provisions of the Railway Labor Act. There is no indication in *Buell*, though, that the FAA's applicability or the congressional policy favoring enforcement of individual arbitration agreements was ever considered. In fact, the Court would not have applied the FAA to the fact situation in *Buell*. Since *Buell* was a railroad employee, the FAA, and its attendant presumption favoring arbitration, had no applicability. See 9

<sup>19</sup> Given that all these cases arose under collective bargaining agreements, and *Buell* and *Barrentine* involved a railroad worker and a transportation worker, the exclusionary provision in section 1 of the FAA likely precluded application of the Act to those cases. See discussion in *Argument II infra*.



U.S.C. § 1. In any event, the Court in *Buell* grappled with the issue of whether the RLA implicitly repealed the FELA insofar as employees covered under RLA collective bargaining agreements were concerned. It did not deal with whether a private agreement to arbitrate could be enforced under the FAA, where doing so would in no way preclude pursuit of the statutory claim at issue. Thus, the issue presented in *Buell* provided no basis for the Court to apply or reject the presumption favoring enforcement of arbitration agreements recognized in *Mitsubishi*.

Petitioner's reliance on *Alexander*, *Barrentine*, *McDonald* and *Buell* also fails to recognize the collective bargaining context in which those cases arose. Yet, that context obviously played a substantial role in the Court's refusal to find the *prior* arbitrations preclusive in *Alexander*, *Barrentine* and *McDonald*, and its refusal to find that the statutory arbitration procedure available in *Buell* was the plaintiff's exclusive remedy.

In *Alexander*, for example, the Court observed that "Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." 415 U.S. at 49 (emphasis added). The Court then noted what it perceived as limitations in collective bargaining arbitration that precluded such arbitration from providing an effective forum for the vindication of Title VII rights. These limitations included the arbitrator's limited role "[a]s the proctor of the bargain, . . . to effectuate the intent of the parties," *id.* at 53, which provided the arbitrator with "no general authority to invoke public laws that conflict with the bargain between the parties . . .," *id.*

The Court also observed that the expertise of such arbitrators is limited "to the law of the shop, not the law of the land." *Id.* at 57. And finally, the Court stated that

[a] further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. . . . In arbitration, as in the collective-bargaining process, the interests of the individual employees may be subordinated to the collective interests of all employees in the bargaining unit. . . . Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made.

*Id.* at 58 n.19 (citations omitted; emphasis added). See also *Barrentine*, 450 U.S. at 735. Such concerns were similarly echoed throughout *Barrentine*, *McDonald*, and *Buell*.

The present case obviously does not fit within the context of *Alexander* or its progeny. Unlike those cases, the present case does not arise under a collective bargaining agreement. Thus, the Court's concerns in *Alexander* about collective bargaining arbitration do not apply here. Significant distinctions exist between the arbitral procedures to be utilized in Petitioner's arbitration and collective bargaining arbitration. Compare NYSE procedures applicable to Petitioner's claim discussed at Argument II. A.2 *supra*. Commentators have observed that the differences between the two models, in large measure, explain why the results in *Alexander*, *Barrentine*, and *McDonald* differ from those in *Mitsubishi*, *McMahon* and *Rodriguez*. See Sheli, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 Tex. L. Rev. 509, 512-14 (1990); *Harv. Note* at 577-80.

Finally, the *Alexander* line of cases also must be questioned in light of the obvious hostility expressed by those cases towards arbitration as a procedure for resolving

statutory claims. If that hostility is simply a recognition of the limitations inherent in collective bargaining arbitrations, it may have some justification, but it is not germane to this case. On the other hand, to the extent that hostility manifests a broader concern applicable to all forms of arbitration, it likely has been eviscerated by this Court's subsequent decisions in the *Mitsubishi - McMahon - Rodriguez de Quijas* line of cases.

### E. Summary of Argument

The foregoing discussion establishes that the Fourth Circuit's decision in this case was correct.<sup>20</sup> As the court

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<sup>20</sup> For these same reasons, Respondent takes issue with those cases relied upon by Petitioner as contrary to the Fourth Circuit's opinion in this case. *E.g.*, *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 842 (1990); *Nicholson v. CPC Internat'l, Inc.*, 877 F.2d 221 (3d Cir. 1989); *Swenson v. Management Recruiters Internat'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S.Ct. 143 (1989). Respondent proffers Judge Becker's dissenting opinion in *Nicholson* and the Fourth Circuit's opinion below as more in line with the approach to arbitrability enunciated by this Court in *Mitsubishi* and *McMahon*. Those opinions give due regard to the congressional purposes underlying the ADEA, while at the same time applying the strong presumptions favoring arbitrability recognized in *Mitsubishi* and *McMahon*. Because each opinion concludes that arbitration will not affect the substantive rights at issue, each reads enforcement of the FAA policy favoring arbitration as consistent, *not* in conflict, with the enforcement of an individual claimant's ADEA rights. This is the better - reasoned approach - giving effect to the purposes underlying both statutes, rather than exalting one to the exclusion of the other. Each opinion also properly recognizes the factual distinctions that make *Alexander, et al.*, inapplicable to cases involving the enforcement of an individual arbitration agreement. A number of other recent cases have been willing to take

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below held, Petitioner has demonstrated nothing in the text or legislative history of the ADEA showing a congressional intent to foreclose arbitration of ADEA claims. The appeals court also correctly determined that the arbitration of Petitioner's claims would not pose an inherent conflict with Congress' objectives in passing the ADEA. Petitioner has raised no arguments here that show any error in that conclusion. Lastly, this Court's decisions in *Alexander, Barrentine, McDonald* and *Buell* do not support Petitioner's arguments for reversal. In any event, those cases hinge, at least in part, on an outdated hostility towards arbitration of statutory claims and may warrant clarification, at least to the extent that they may be interpreted as precluding arbitration of all statutory employment claims under individual arbitration agreements.<sup>21</sup>

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this approach, as well. *See, e.g.*, *Pierce v. Shearson Lehman Hutton, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1882 (N.D. Ill. 1990) (Conlon, J.) (ADEA claim); *Roe v. Kidder, Peabody & Co.*, 52 Fair Empl. Prac. Cas. (BNA) 1865 (S.D.N.Y. 1990) (Haight, J.) (Title VII and section 1981 claims). *See also Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988) (ERISA claim).

Respondent also disagrees, on the same grounds, with the EEOC's recent policy guidance memorandum addressing the issue in this case. *See* EEOC Notice No. N-915-060 (August 29, 1990). Respondent also questions whether any weight should be accorded the EEOC's interpretation. It obviously was stated long after enactment of the ADEA and seems to have been issued for the Court's consideration in this case.

<sup>21</sup> *See generally* this Court's order of remand in *Shearson Lehman/American Express, Inc. v. Bird*, 110 S.Ct. 225 (1989), *vacating and remanding*, 871 F.2d 292 (2d Cir. 1989). The Second Circuit had held that an ERISA claim was not subject to compulsory arbitration, in large measure because of the importance

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## II. THE ARBITRATION AGREEMENT APPLICABLE TO PETITIONER'S CLAIMS IS ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT.

In briefs submitted amicus curiae, the AFL-CIO, AARP and Lawyers Committee for Civil Rights argue that section 1 of the FAA excludes Petitioner's arbitration agreement from the Act's coverage. Section 1 of the FAA states, in pertinent part, that "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce" are not covered by the statute. 9 U.S.C. § 1. According to the aforementioned amici, this provision excludes *all* employment contracts from the coverage of the FAA and thus precludes Respondent from enforcing the arbitration agreement as to Petitioner's claims. This argument is incorrect.

An obvious point overlooked by the amici is the context in which Petitioner's arbitration agreement arose. The arbitration agreement actually arises in Petitioner's registration agreement with the NYSE. In that agreement, he agreed to the constitution, rules and bylaws of the Exchange and agreed to arbitrate any dispute between him and his firm in accordance with the rules, constitution and bylaws of the Exchange. See Petitioner's Application for Securities Industry Registration (J.A. at 15-19). Petitioner also executed this provision as a condition of his employment with Respondent, since his registration with the Exchange was necessary to fulfill his duties. The provision thus also became part of his employment contract with Respondent. Affidavit of Franklin C. Golden ¶ 1 (J.A. at 74).

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of the remedial objectives underlying ERISA. This Court remanded *Bird* for reconsideration in light of *Rodriguez de Quijas*.

Petitioner's arbitration agreement is enforceable over and beyond his employment contract with Respondent. The arbitration agreement also is enforceable by Respondent as a contract between Plaintiff, as a registered representative working in the Exchange, the Exchange, and its member companies, that inures to the benefit of Respondent as a member company, just as it would to customers, other Exchange members, and the Exchange. The enforceability of Petitioner's agreement to arbitrate in this regard is no different than the enforceability of any member company's, allied member's, or registered representative's obligations under the Exchange's constitution, rules and bylaws.

It has been stated that "the constitution and rules of a stock exchange constitute a contract between all members of the exchange with each other and with the exchange itself." *Legg, Mason & Co. v. Mackall & Coe, Inc.*, 351 F.Supp. 1367, 1370 (D.D.C. 1972) (citations omitted). This "contract" consists of the very rules and regulations by which the Exchange, as a Self-Regulatory Organization (SRO), governs itself, its members and the employees of the Exchange and its member companies, subject to SEC oversight. The arbitration provision to which Petitioner agreed upon his registration with the Exchange is an important part of this contract of interwoven obligations. It, like the other provisions of the Exchange's constitution, rules and bylaws, "reflects the self-regulation of the securities industry, as well as the effort to provide an integrated method of resolving disputes involving the affairs of the NYSE." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1289 (8th Cir. 1984). In this respect, the arbitration provision generally is deemed binding on both the employee and his member-employer and enforceable by each. In *Coenen v. R. W. Pressprich &*



Co., 453 F.2d 1209 (2d Cir.), cert. denied, 406 U.S. 949 (1972), for example, the court observed:

Since the rules of the Exchange "constitute a contract between the members, the arbitration provisions which they embody have contractual validity." . . . The Exchange provisions requiring arbitration constitute an agreement to arbitrate which is binding upon both [parties].

453 F.2d at 1211, quoting *Brown v. Gilligan, Will & Co.*, 287 F.Supp. 766, 769-70 (S.D.N.Y. 1968); accord, e.g., *Tullis v. Kohlmeyer & Co.*, 551 F.2d 632, 638 n.8 (5th Cir. 1977); *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 587 F.Supp. at 1523 (N.D. Ga. 1984). See generally *Aspero v. Shearson American Express, Inc.*, 768 F.2d 106 (6th Cir. 1985); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163, 1165 & n.2 - 1166 & n.5 (8th Cir. 1984) (in particular see cases cited at n.4); *Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 664 F. Supp. 969 (E.D. Pa. 1987); *Malison v. Prudential-Bache Secs., Inc.*, 654 F. Supp. 101 (W.D.N.C. 1987), all of which hold such arbitration provisions binding and enforceable in individual disputes between brokerages and their employees or former employees.

To focus on the arbitration agreement at issue here as simply part of Plaintiff's employment contract with Respondent would ignore the larger context in which the agreement truly arises and in which it is enforceable. When viewed instead as part of Plaintiff's commitment to the same contract that governs all members and members' representatives who participate in the SRO's activities, the arbitration provision indisputably fits within the FAA and is enforceable by Respondent under section 2 of that Act. As one court has observed, "[t]here is no doubt that the contract between the parties to arbitrate controversies under the Constitution and Rules of the New York Stock Exchange evidences a 'transaction involving commerce' within the meaning of section 2 of the Act." *Legg,*

*Mason & Co.*, 351 F.Supp. at 1370. Thus, another court has stated, "[t]he principle that an arbitration provision, incorporated by reference into an application to become an allied member of a stock exchange, is enforceable where there has been no fraud in the inducement, is so clearly established that no further discussion is necessary." *O'Neel v. National Ass'n of Sec. Dlr., Inc.*, 667 F.2d 804, 806 (9th Cir. 1982); accord, *A.G. Edwards & Son, Inc. v. Smith*, 11 Empl. Ben. Coord. (BNA) 2430, 2432 (D. Ariz. 1989) (applying the same principle to registered representative). Respondent therefore submits that the case law emphatically establishes that the section 1 proviso would not preclude arbitration of the present dispute, even if it excluded *all* employment contracts from the FAA's coverage as the amici contend.

In any event, the amici's argument that section 1 excludes all employment contracts overlooks the plain language of the statute. Congress sought only to exclude a particular category of "workers' " agreements from the FAA's coverage - i.e., only "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." See 9 U.S.C. § 1. It did not purport to exclude "all" employment contracts.<sup>22</sup> Had Congress intended to write *all* employment contracts out of the FAA, it could very easily have done so; simply stating that "nothing herein contained shall apply to *any* contracts of employment" would have sufficed.

<sup>22</sup> The Court previously has observed that Congress "amended . . . the statute to exclude *certain kinds* of employment contracts." *Prima Paint Corp.*, 388 U.S. at 401 n.7 (emphasis added). This description differs significantly from saying that Congress excluded *all* employment contracts.

A review of the legislative history and judicial interpretation of section 1's exclusionary language<sup>23</sup> demonstrates that Congress sought only to exclude those contracts in which organized labor, principally the Seamen's Union, had significant interests in maintaining its influence. Organized labor wanted to ensure it and its members remained free of any efforts by management to force arbitration agreements upon weak unions or individual seamen, and free of judicial directives to honor agreements to arbitrate that might have limited labor from using other forms of economic pressure that might prove more persuasive in a given situation. See *American Postal Workers Union v. United States Postal Serv.*, 823 F.2d 466, 470 (11th Cir. 1987) ("Organized labor, which was already aggrieved by actions of the federal judiciary, did not want federal courts to have the power to order it to arbitrate disputes with management. Accordingly, at the behest of the Seamen's Union, Congress included [the present exclusionary language found in section 1].") The objections of organized labor to the original language of the FAA that are referenced in the AFL-CIO's and AARP's briefs are limited precisely to these concerns. See, e.g., *Proceedings of the Twenty-Sixth Annual Convention of the International Seamen's Union of America*, 203-04 (1923) (comments of Andrew Furuseth that compulsory arbitration would and seamen's traditional "right to quit work in harbor" and restore slavery); Brief of AFL-CIO, 17-19.

Similarly, in responding to labor's concerns, the principal proponents of the FAA sought to clarify that they had no intention "to make an industrial arbitration" or to

<sup>23</sup> Of course, resort to such legislative history and judicial interpretation is hardly necessary to determine that the exclusion does not cover all employment contracts as the amici contend; the plain language of the statute shows that fact.

compel arbitration of "labor disputes." *Hearing before a Subcommittee of the Senate Committee on the Judiciary, on S.4213 and S.4214, 67th Cong., 4th Sess. 9 (1923)* (statement of Mr. Piatt). From the context of these statements, one can clearly discern that the proponents of the Act were acknowledging only that they had no intention of compelling arbitration of labor-management disputes. They accordingly deferred to organized labor's objections, principally those expressed by the Seamen's Union, to exclude those categories of contracts within organized labor's area of interest.

In light of the context in which the exclusionary provision was added to the statute, and the choice of words used to describe the subject of the exclusion, it has since become well settled that the exclusionary provision is more limited in scope than the amici have recognized. In *United Elec., R. & M. Workers v. Miller Metal Products*, 215 F.2d 221 (4th Cir. 1954), the Fourth Circuit observed:

*It appears that the exclusion clause of the Arbitration Act was introduced into the statute to meet an objection of the Seafarers International Union; and certainly such objection was directed at including collective bargaining agreements rather than individual contracts of employment under the provisions of the statute. The terms of the collective bargaining agreement become terms of the individual contracts of hiring made subject to its provisions and the controversies as to which arbitration would be appropriate arise in almost all instances, not with respect to the individual contracts of hiring, but with respect to the terms engrafted on them by the collective bargaining agreement. It is with respect to the latter that objection arises to the compulsory submission to arbitration which the Arbitration Act envisages. No one would have serious objection to submitting to arbitration the matters covered by the individual contracts of hiring divorced from the provisions*



*grafted on them by the collective bargaining agreements.*

*Id.* at 224 (emphasis added). The Fourth Circuit thus recognized that the proviso to section 1 of the FAA had only a limited purpose – to exclude collective bargaining agreements from the coverage of the Act in light of organized labor's objections.<sup>24</sup> It saw nothing, however, to indicate that individual arbitration agreements were excluded from the Act by section 1.

Other courts also have drawn meaning from Congress' explicit reference to "workers'" contracts and to particular categories of "workers" in the exclusionary provision of the FAA. Thus, in *Tenney Eng. v. United Elec., R. & M. Workers*, 207 F.2d 450 (3rd Cir. 1953), the Third Circuit, in perhaps the seminal case interpreting the exclusionary provision, construed the provision to except only contracts of workers in the enumerated categories or in a similar class of workers moving goods through interstate commerce, and contracts of workers engaged in the transportation industry. Since *Tenney* numerous other courts have found that various categories of employees not fitting the description of "workers engaged in . . . interstate commerce" are not subject to the exclusionary provision. See, e.g., *Stokes v. Merrill Lynch, Pierce, Fenner &*

<sup>24</sup> For this same reason, the amici's reference to *United Paperworkers Internat'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) is meaningless. That case arose in the context of collective bargaining agreement arbitration. At most, the Court's observation that the FAA "does not apply to 'contracts of employment of . . . workers engaged in foreign or interstate commerce'" but may provide "guidance in labor arbitration . . ." *id.* at 372 n.9 indicates that the FAA does not control arbitration under collective bargaining agreements. It does not support the argument that all employment contracts are excluded from the FAA, and it clearly has no application to the context in which this case arises.

*Smith, Inc.*, 523 F.2d 433, 436 (6th Cir. 1975) (stock brokerage account executives "do not seriously contend . . . they fall within the exception from coverage in § 1 of the Arbitration Act. . . ."); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972) (professional athlete); *Dickstein v. duPont*, 443 F.2d 783 (1st Cir. 1971) (stockbroker); *Signal-Stat Corp. v. Local 475, United Elec., R. & M. Workers*, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957) (production workers under collective bargaining agreement who were not moving goods through commerce or working in an interstate transportation function); *Tonetti v. Shirley*, 173 Cal. App. 3d 1144, 219 Cal. Rptr. 616, 618 (1985) (stockbroker). See also *Bernhardt v. Polygraphic Co. of Amer., Inc.*, 218 F.2d 948, 951-52 (2d Cir. 1955), *rev'd on other grounds*, 350 U.S. 198 (1956) ("Plaintiff was not hired as a 'worker' but as a plant superintendent at a salary of \$15,000 a year, with managerial duties fundamentally different from those of 'workers.'").

On at least one occasion this Court has implicitly recognized that an individual registration agreement like Petitioner executed here is covered by the FAA, section 1's proviso notwithstanding. In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court held that the FAA preempted a state wage payment law that exempted claims under the statute from arbitration. The Court's holding compelled the claimant, who, like Petitioner here, individually had agreed to arbitrate any dispute with his employer as part of his registration application with the NYSE, to arbitrate a wage payment claim. Although the Court did not expressly consider whether employment contracts were excluded from coverage under the FAA by section 1's proviso, it nonetheless read the FAA as preempting a state statutory provision applicable to the plaintiff's claim. In so doing the Court observed that the FAA's



"general applicability reflects that '[t]he preeminent concern of Congress in passing the Act was to enforce *private agreements into which parties had entered.*' . . . " *Id.* at 490, quoting *Byrd*, 470 U.S. at 221 (emphasis added). It seems doubtful the Court would have accorded the FAA such an expansive preemptive effect on the facts of that case if it had not recognized that the FAA applied to individual arbitration agreements like that to which the plaintiff in *Perry* and the Petitioner here were parties.

### CONCLUSION

The decision of the Fourth Circuit Court of Appeals should be affirmed. The court properly determined that nothing in the text, legislative history or underlying purposes of the ADEA preclude arbitration as a forum for effectively resolving those claims. Because the arbitration agreement to which Petitioner was a party covered his ADEA claims and was valid and enforceable under the FAA, the court was correct in directing the district court to order Petitioner to arbitration.

Dated this the 19th day of December, 1990.

Respectfully submitted,

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### APPENDIX

#### Controversies As to Employment or Termination of Employment

(From Rules of Board of Directors of  
New York Stock Exchange, Inc.)

**Rule 347.** Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

#### Amendments.

April 17, 1958.

April 3, 1975; effective May 1, 1975

#### Revised NYSE Arbitration Rules<sup>1</sup>

#### Arbitration

**Rule 600.** (a) Any dispute, claim or controversy between a customer or non-member and a member, allied member, member organization and/or associated person arising in connection with the business of such member, allied member, member organization and/or associated person in connection with his activities as an associated person shall be arbitrated under the Constitution and Rules of the New York Stock Exchange, Inc. as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member.

<sup>1</sup> See Note at end of Appendix.

## App. 2

(b) Under this Code, the New York Stock Exchange, Inc. shall have the right to decline the use of its arbitration facilities in any dispute, claim or controversy, where – having due regard for the purposes of the New York Stock Exchange, Inc. and the intent of this Code – such dispute, claim or controversy is not a proper subject matter for arbitration.

### Simplified Arbitration

**Rule 601.** (a) Any dispute, claim or controversy, arising between a public customer(s) and an associated person or a member subject to arbitration under this code involving a dollar amount not exceeding \$5,000, exclusive of attendant costs and interest, shall upon demand of the customer(s) or by written consent of the parties, be arbitrated as herein after provided.

(b) The Claimant shall file with the Director of Arbitration an executed Submission Agreement and a copy of the Statement of Claim of the controversy in dispute and the required deposit, together with documents in support of the Claim. Sufficient copies of the Submission Agreement and the Statement of Claim and supporting documents shall be provided to the Director of Arbitration for each party and the arbitrator. The Statement of Claim shall specify the relevant facts, the remedies sought and whether or not a hearing is demanded.

(c) The claimant shall pay the sum of \$15.00 if the amount in controversy is \$1,000 or less, \$25.00 if the amount is more than \$1,000 but \$2,500 or less, or \$100 if the amount in controversy is more than \$2,500, but does

## App. 3

not exceed \$5,000 upon filing of the Submission Agreement. The final disposition of this sum shall be determined by the arbitrator.

(d) The Director of Arbitration shall endeavor to serve promptly, by mail or otherwise, on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim. Within twenty (20) calendar days from receipt of the Statement of Claim, Respondent(s) shall serve each party with an executed Submission Agreement and a copy of Respondent's Answer. Respondent's executed Submission Agreement and Answer shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s) along with any deposit required under the schedule of fees for customer disputes. The Answer shall designate all available defenses to the Claim and may set forth any related Counterclaim and/or related Third Party Claim the Respondent(s) may have against the Claimant or any other person. If the Respondent(s) has interposed a Third Party Claim, the Respondent(s) shall serve the Third Party Respondent with an executed Submission Agreement, a copy of Respondent's Answer containing the Third Party Claim and a copy of the original Claim filed by the Claimant. The Third Party Respondent shall respond in the manner herein provided for response to the Claim. If the Respondent(s) files a related Counterclaim exceeding \$5,000, the arbitrator may refer the claim, counterclaim and/or Third Party Claim, if any, to a panel of three (3) or five (5) arbitrators in accordance with Rule 607 of this Code or, he may dismiss the Counterclaim and/or Third Party Claim without prejudice to the Counterclaimant(s) and/or Third Party Claimant(s) pursuing

#### App. 4

the counterclaim and/or Third Party Claim in a separate proceeding. The costs to the Claimant under either proceeding shall in no event exceed \$200.

(e) All parties shall serve promptly by mail or otherwise on all other parties and the Director of Arbitration, with sufficient additional copies for the arbitrators, a copy of the Answer, Counterclaim, Third Party Claim, amended claim or other responsive pleading, if any. The claimant, if a Counterclaim is asserted against him, shall within ten (10) calendar days either:

(i) Serve on each party and on the Director of Arbitration with sufficient additional copies for the arbitrator(s) a reply to any counterclaim, or

(ii) if the amount of the Counterclaim exceeds the Claim, have the right to file a statement withdrawing the Claim. If the Claimant withdraws the Claim, the proceedings will be discontinued without prejudice to the rights of the parties.

(f) The dispute, claim or controversy shall be submitted to a single arbitrator knowledgeable in the securities industry selected by the Director of Arbitration. Unless the public customer demands or consents to a hearing, or the arbitrator(s) calls a hearing, the arbitrator shall decide the dispute, claim or controversy solely upon the pleadings and evidence filed by the parties. If a hearing is necessary, such hearing shall be held as soon as practicable at a locale selected by the Director of Arbitration.

#### App. 5

(g) The Director of Arbitration may grant extensions of time to file any pleading upon a showing of good cause.

(h) The arbitrator shall be authorized to require the submission of further documentary evidence as he, in his sole discretion, deems advisable.

(i) Upon the request of the arbitrator, the Director of Arbitration shall appoint two (2) additional arbitrators to the panel which shall decide the matter in controversy.

(j) In any case where there is more than one (1) arbitrator, the majority will be public arbitrators.

(k) In his discretion, the arbitrator may, at the request of any party, permit such party to submit additional documentation relating to the pleadings.

(l) Except as otherwise provided herein, the general arbitration rules of the New York Stock Exchange, Inc. shall be applicable to proceedings instituted under this Code.

#### **Amendment.**

December 6, 1984.

May 10, 1989.

#### **Hearing Requirements - Waiver of Hearing**

**Rule 602.** (a) Any dispute, claim or controversy, except as provided in Section 2 (Simplified Arbitration), shall require a hearing unless all parties waive such hearing in writing and request that the matter be resolved solely upon the pleadings and documentary evidence.



## App. 6

(b) Notwithstanding a written waiver of a hearing by the parties, a majority of the arbitrators may call for and conduct a hearing. In addition, any arbitrator may request the submission of further evidence.

### Time Limitation Upon Submission

**Rule 603.** No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years shall have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

#### Amendment.

December 6, 1984.

### Dismissal of Proceedings

**Rule 604.** At any time during the course of an arbitration, the arbitrators may either upon their own initiative or at the request of a party, dismiss the proceeding and refer the parties to the remedies provided by law. The arbitrators shall upon the joint request of the parties dismiss the proceedings.

### Settlements

**Rule 605.** All settlements upon any matter submitted shall be at the election of the parties.

## App. 7

### Tolling of time Limitation(s) for the Institution of Legal Proceedings and Extension of Time Limitation(s) for Submission to Arbitration

**Rule 606.** (a) Where permitted by law, the time limitation(s) which would otherwise run or accrue for the institution of legal proceedings, shall be tolled when a duly executed Submission Agreement is filed by the claimant(s). The tolling shall continue for such period as the New York Stock Exchange, Inc. shall retain jurisdiction upon the matter submitted.

(b) The six (6)-year time limitation upon submission to arbitration shall not apply when the parties have submitted the dispute, claim or controversy to a court of competent jurisdiction. The six (6)-year time limitation shall not run for such period as the court shall retain jurisdiction upon the matter submitted.

#### Amendment.

December 6, 1984.

### Designation of Number of Arbitrators

#### Rule 607. (a) Public Controversies

(1) In all arbitration matters involving public customers and other non-members where the amount in controversy is \$500,000 or more, the Director of Arbitration shall appoint an arbitration panel which shall consist of five (5) arbitrators unless the parties agree in writing to a panel of three (3) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

(2) An arbitrator will be deemed as being from the securities industry if he or she:

1. is a person associated with a member, broker/dealer, government securities dealer, municipal securities dealer, or registered investment adviser, or

2. has been associated with any of the above within the past five (5) years or

3. is retired from or spent a substantial part of his or her business career in any of the above, or

4. is an attorney, accountant or other professional who devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two (2) Years.

(3) An arbitrator who is not from the securities industry shall be deemed a public arbitrator. A person will not be classified as a public arbitrator if he or she has a spouse or other member of the household who is a person associated with a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer or investment adviser.

(b) Composition of Panels

The individuals who shall serve on a particular arbitration panel shall be determined by the Director of Arbitration. The Director of Arbitration may name the chairman of each panel.

**Amended.**

June 18, 1986.

May 10, 1989.

**Notice of Selection of Arbitrators**

**Rule 608.** The Director of Arbitration shall inform the parties of the names and employment histories of the arbitrators for the past ten (10) years, as well as information disclosed pursuant to Rule 610, at least eight (8) business days prior to the date fixed for the initial hearing session. A party may make further inquiry of the Director of Arbitration concerning an arbitrator's background. In the event that any arbitrator, after appointment and prior to the first hearing session, should resign, die, withdraw, be disqualified or otherwise be unable to perform as an arbitrator, the Director of Arbitration shall appoint a new member to the panel to fill any vacancy. The Director of Arbitration shall inform the parties of the name and employment history of the replacement arbitrator for the past ten years, as well as information disclosed pursuant to Rule 610, as soon as possible. A party may make further inquiry of the Director of Arbitration concerning the background of the replacement arbitrator and within the time remaining prior to the first hearing session or the five (5) day period provided under Rule 609, whichever is shorter, may exercise its right to challenge the replacement arbitrator as provided in Rule 609.

**Amended.**

May 10, 1989.

**Peremptory Challenge**

**Rule 609.** In any arbitration proceeding, each party shall have the right to one peremptory challenge. In

arbitrations where there are multiple claimants, respondents and/or third party respondents, the claimants shall have one peremptory challenge, the respondents shall have one peremptory challenge and the third party respondents shall have one peremptory challenge, unless the Director of Arbitration determines that the interests of justice would best be served by awarding additional peremptory challenges. Unless extended by the Director of Arbitration, a party wishing to exercise a peremptory challenge must do so by notifying the Director of Arbitration in writing within five (5) business days of notification of the identity of the persons named to the panel. There shall be unlimited challenges for cause.

#### **Amendments.**

December 6, 1984.

#### **Disclosures Required of Arbitrators**

**Rule 610.** (a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any existing or past financial business, professional, family or social relationships that are likely to affect impartiality or might reasonably create an appearance of partiality of bias. Persons requested to serve as arbitrators should disclose any such relationships which they personally have with any party or its counsel, or with any individual whom they have been told

will be a witness. They should also disclose any such relationship involving members of their families or their current employers, partners or business associates.

(b) Persons who are requested to accept appointment as arbitrator should make a reasonable effort to inform themselves of any interests or relationships described in Paragraph (a) above.

(c) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in subsection (a) hereof is a continuing duty that requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests, relationships, or circumstances that arise, or are recalled or discovered.

(d) Prior to the commencement of the first hearing session, the Director of Arbitration may remove an arbitrator based on information disclosed pursuant to this section. The Director of Arbitration shall also inform the parties of any information disclosed pursuant to this section, if the arbitrator who disclosed the information is not removed.

#### **Amended.**

May 10, 1989.

#### **Disqualification or Other Disability of Arbitrators**

**Rule 611.** In the event that any arbitrator, after the commencement of the first hearing session and prior to the rendition of the award, should resign, die, withdraw,



be disqualified or otherwise be unable to perform as an arbitrator, the remaining arbitrator(s) may continue with the hearing and determination of the controversy, unless such continuation is objected to by any party within five (5) days of notification of the vacancy on the panel. Upon rejection, the Director of Arbitration shall appoint a new member to the panel to fill any vacancy. The Director of Arbitration shall inform the parties as soon as possible of the name and employment history for the past ten (10) years of the replacement arbitrator, as well as information disclosed pursuant to Rule 610. A party may make further inquiry of the Director of Arbitration concerning the replacement arbitrator's background and within the time remaining prior to the next scheduled hearing session or the five (5) day period provided under Rule 609, whichever is shorter, may exercise its right to challenge the replacement arbitrator as provided in Rule 609.

**Amended.**

May 10, 1989.

**Initiation of Proceedings**

**Rule 612.** Except as otherwise provided herein, an arbitration proceeding under this Code shall be instituted as follows:

(a) Statement of Claim

The Claimant shall file with the Director of Arbitration three (3) executed copies of the Submission Agreement and an executed Submission Agreement, a Statement of Claim together with documents in support of the claim and the required deposit. Sufficient additional copies of the Submission Agreement and the Statement of

Claim and supporting documents shall be provided to the Director of Arbitration for each party and each arbitrator. The Statement of Claim should specify the relevant facts and the remedies sought. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim.

(b) Service and Filing with the Director of Arbitration

For purposes of the Code of Arbitration Procedure, service may be effected by mail or other means of delivery. Service and filing are accomplished on the date of mailing either by first-class postage prepaid or by means of overnight mail service or, in the case of other means of service, on the date of delivery. Filing with the Director of Arbitration shall be made on the same date as service.

(c) Answer, Defenses, Counterclaims and/or Cross-Claims

(1) Within twenty (20) business days from receipt of the Statement of Claim, the Respondent(s) shall serve each party with an executed Submission Agreement and a copy of Respondent(s) Answer. An executed Submission Agreement and Answer of the Respondent(s) shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s), along with any deposit required under the schedule of fees. The Answer shall specify all available defenses and the relevant facts that will be relied upon at hearing and may set forth any related Counterclaim the Respondent(s) may have against the Claimant, any Cross-Claim the Respondent(s) may have against any other named Respondent(s) and any Third Party Claim against any other party or person based

upon any existing dispute, claim or controversy subject to arbitration under this Code.

(2)(i) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent or Third Party Respondent who pleads only a general denial as an answer may, upon objection by a party, in the discretion of the arbitrators, be barred from presenting any facts or defenses at the time of the hearing.

(ii) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent or Third Party Respondent who fails to specify all available defenses and relevant facts in such party's answer, may, upon objection by a party, in the discretion of the arbitrators, be barred from presenting such facts or defenses not included in such party's answer at the hearing.

(iii) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent or Third Party Respondent who fails to file an answer within twenty (20) business days from receipt of service, or unless the time to answer has been extended pursuant to paragraph (5), may, in the discretion of the arbitrators, be barred from presenting any matter, arguments or defenses at the hearing.

(3) Respondent(s) shall serve each party with a copy of any Third Party Claim. The Third Party Claim shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s), along with any deposit required under the schedule of fees. Third Party Respondent(s) shall respond in the manner provided for response to the claim, as provided in (1) and (2) above.

(4) The Claimant shall serve each party with a reply to a counterclaim within ten (10) business days of receipt of an Answer containing a

Counterclaim. The reply shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s).

(5) The Director of Arbitration may extend any time period in this section whether such be denominated as a Claim, Answer, Counterclaim, Cross-Claim, Reply or Third Party pleading.

(d) Joining and Consolidation - Multiple Parties

(1) With respect to any dispute, claim or controversy submitted to arbitration, any party or person eligible to submit a claim under this Code shall have the right to proceed in the same arbitration against any other party or person upon any claim directly related to such dispute.

(2) For purposes of this subsection, the Director of Arbitration shall be authorized to determine preliminarily whether a claim is directly related to the matter in dispute and to join any other party to the dispute and to consolidate the matter for hearing and award purposes. In arbitrations where there are multiple claimants, respondents and/or third party respondents, the Director of Arbitration shall be authorized to determine preliminarily whether such parties should proceed in the same or separate arbitrations.

(3) All final determinations with respect to joining, consolidation and multiple parties under this subsection shall be made by the arbitration panel.

#### Amendments.

December 6, 1984.

June 18, 1986.

May 10, 1989.

### **Designation of Time and Place of Hearings**

**Rule 613.** Unless the law directs otherwise, the time and place for the initial hearing shall be determined by the Director of Arbitration and each hearing thereafter by the arbitrators. Notice of the time and place for the initial hearing shall be given at least eight (8) business days prior to the date fixed for the hearing by personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this section. Notice for each hearing, thereafter, shall be given as the arbitrators may determine. Attendance at a hearing waives notice thereof.

### **Representation by Counsel**

**Rule 614.** All parties shall have the right to representation by counsel at any stage of the proceedings.

### **Attendance at Hearings**

**Rule 615.** The attendance or presence of all persons at hearings including witnesses shall be determined by the arbitrators. However, all parties to the arbitration and their counsel shall be entitled to attend all hearings.

### **Failure to Appear**

**Rule 616.** If any of the parties, after due notice, fails to appear at a hearing or any adjourned hearing session, the arbitrators may, in their discretion, proceed with the arbitration of the controversy. In such cases, all awards shall be rendered as if each party had entered an appearance in the matter submitted.

### **Adjournments**

**Rule 617.** (a) The arbitrators may, in their discretion, adjourn any hearing(s) either upon their own initiative or upon the request of any party to the arbitration.

(b) A party requesting an adjournment after arbitrators have been appointed, if said adjournment is granted, shall pay a fee equal to the deposit of costs but not more than \$100. The arbitrators may waive this fee or in their awards may direct the return of this adjournment fee. This provision shall not apply to cases filed pursuant to Rule 601.

### **Amendment.**

June 18, 1986.

### **Acknowledgement of Pleadings**

**Rule 618.** The arbitrators shall acknowledge to all parties present that they have read the pleadings filed by the parties.

### **General Provisions Governing Pre-Hearing Proceeding**

**Rule 619.** (a) Requests for Documents and Information

The parties shall cooperate to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration. Any request for documents or other information should be specific, relate to the matter in controversy, and afford the party to whom the request is made a reasonable period of time to



respond without interfering with the time set for the hearing.

(b) Document Production and Information Exchange

(1) Any party may serve a written request for information or documents ("information request") upon another party twenty (20) business days or more after service of the Statement of Claim by the Director of Arbitration or upon filing of the Answer, whichever is earlier. The requesting party shall serve the information request on all parties and file a copy with the Director of Arbitration. The parties shall endeavor to resolve disputes regarding an information request prior to serving any objection to the request. Such efforts shall set forth in the objection.

(2) Unless a greater time is allowed by the requesting party, information requests shall be satisfied or objected to within thirty (30) calendar days from the date of service. Any objection to an information request shall be served by the objecting party on all parties and filed with the Director of Arbitration.

(3) Any response to objections to an information request shall be served on all parties and filed with the Director of Arbitration within ten (10) calendar days of receipt of the objection.

(4) Upon written request of a party whose information request is unsatisfied, the matter will be referred by the Director of Arbitration to either a pre-hearing conference under paragraph (d) of this section or to a selected arbitrator under paragraph (e) of this section.

(c) Pre-Hearing Exchange

At least ten (10) calendar days prior to the first scheduled hearing date, all parties shall serve on each other copies of documents in their possession that they intend to present at the hearing and identify witnesses they intend to present at the hearing. The arbitrator(s) may exclude from the arbitration, any document not exchanged or witnesses not identified at that time. This paragraph does not require service of copies of documents or identification of witnesses which parties may use for cross-examination or rebuttal.

(d) Pre-Hearing Conference

(i) Upon the written request of a party, an arbitration, or at the discretion of the Director of Arbitration, a pre-hearing conference shall be scheduled. The Director of Arbitration shall set the time and place of a pre-hearing conference and appoint a person to preside. The pre-hearing conference may be held by telephone conference call. The presiding person shall seek to achieve agreement among the parties on any issues that relate to the pre-hearing process or to the hearing, including but not limited to, the exchange of information, exchange or production of documents, identification of witnesses, identification and exchange of hearing documents, stipulations of fact, identification and briefing of contested issues, and any other matter which will expedite the arbitration proceedings.

(2) Any issues raised at the pre-hearing conference that are not resolved may be referred by the Director of Arbitration to a single member of the Arbitration Panel for decision.

## (e) Decisions by Selected Arbitrator

The Director of Arbitration may appoint a single member of the Arbitration Panel to decide all unresolved issues referred to under this section. Such arbitrator shall be authorized to act on behalf of the panel to issue subpoenas, direct appearances of witnesses and production of documents, set deadlines and issue any other ruling which will expedite the Arbitration proceeding or is necessary to permit any party to develop fully its case. Decisions under this paragraph shall be made upon the papers submitted by the parties, unless the arbitrator calls a hearing. The Arbitrator may elect to refer any issue under this paragraph.

## (f) Subpoenas

The arbitrator(s) and any counsel of record to the proceedings shall have the power of the subpoena process as provided by law. All parties shall be given a copy of the subpoena upon its issuance. The parties shall produce witnesses and present proofs to the fullest extent possible without resort to the subpoena process.

## (g) Power to Direct Appearance and Production of Documents

The arbitrator(s) shall be empowered without resort to the subpoena process to direct the appearance of any person employed or associated with any member or member organization of the New York Stock Exchange, Inc. and/or the production of any records in the possession or control of such persons or members. Unless the arbitrator(s) direct otherwise, the party requesting the appearance of a person or the production of documents

under this section shall bear all reasonable costs of such appearance and/or production.

**Amended.**

May 10, 1989.

**Evidence**

**Rule 620.** The arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence.

**Renumbered.**

May 10, 1989.

**Interpretation of Code**

**Rule 621.** The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties.

**Renumbered.**

May 10, 1989.

**Determinations of Arbitrators**

**Rule 622.** All rulings and determinations of the panel shall be by a majority of the arbitrators.

**Renumbered.**

May 10, 1989

### Record of Proceedings

**Rule 623.** A verbatim record by stenographic reporter or tape recording of all arbitration hearings shall be kept. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request unless the arbitrators direct otherwise. The arbitrators may also direct that the record be transcribed. If the record is transcribed at the request of any party, a copy shall be provided to the arbitrators.

#### Amended.

May 10, 1989.

### Oaths of the Arbitrators and Witnesses

**Rule 624.** Prior to the commencement of the first session, an oath or affirmation shall be administered to the arbitrators. All testimony shall be under oath or affirmation.

#### Renumbered.

May 10, 1989.

### Amendments

**Rule 625.** (a) After the filing of any pleadings, if a party desires to file a new or different pleading, such change must be made in writing and filed with the Director of Arbitration. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise upon all other parties a copy of said change. The other parties may, within ten (10) business days from the receipt of service, file a response with the Director of Arbitration.

(b) After a panel has been appointed, no new or different pleading may be filed except for a responsive pleading as provided for in (a) above or with the panel's consent.

#### Amendment.

December 6, 1984.

#### Renumbered.

May 10, 1989.

### Reopening of Hearings

**Rule 626.** Where permitted by law, the hearings may be reopened by the arbitrators on their own motion or in the discretion of the arbitrators upon application of a party at any time before the award is rendered.

#### Renumbered.

May 10, 1989.

### Awards

**Rule 627.** (a) All awards shall be in writing and signed by a majority of the arbitrators or in such manner as is required by law. Such awards may be entered as a judgment in any court of competent jurisdiction.

(b) Unless the law directs otherwise, all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal.

(c) The Director of Arbitration shall endeavor to serve a copy of the award: (i) by registered or certified



mail upon all parties, or their counsel, at the address of record; or, (ii) by personally serving the award upon the parties; or, (iii) by filing or delivering the award in such manner as may be authorized by law.

(d) The arbitrator(s) shall endeavor to render an award within thirty (30) days from the date the record is closed.

(e) The award shall contain the names of the parties, a summary of the issues in controversy, the damages and/or other relief requested, the damage and/or other relief award, a statement of any other issues resolved, the names of the arbitrators, the dates the claim was filed and the award rendered, the number and dates of hearing sessions, the location of the hearing, and the signatures of the arbitrators concurring in the award.

(f) The awards shall be made publicly available, provided however, that the name of the customer party to the arbitration will not be publicly available if he or she so requests in writing.

#### **Amended.**

May 10, 1989.

#### **Miscellaneous**

**Rule 628.** This Code shall be deemed a part of and incorporated by reference in every duly-executed Submission Agreement which shall be binding on all parties.

#### **Renumbered.**

May 10, 1989.

#### **Schedule of Fees**

**Rule 629.** (a) At the time of filing a Claim, Counterclaim, Third-Party Claim or Cross-Claim, a Claimant shall deposit with the New York Stock Exchange, Inc. the amount indicated below unless such deposit is specifically waived by the Director of Arbitration.

<i>Amount in Dispute</i>	<i>Deposit</i>
(Exclusive of interest and expenses)	
\$1,000 or less .....	\$ 15
Above \$1,000—but not exceeding \$2,500 .....	.25
Above \$2,500—but not exceeding \$5,000 .....	.100
Above \$5,000—but not exceeding \$10,000 .....	.200
Above \$10,000—but not exceeding \$50,000 .....	.400
Above \$50,000—but not exceeding \$100,000 .....	.500
Above \$100,000—but not exceeding \$500,000 .....	.750
Above \$500,000 .....	\$1,000

Where the amount in dispute is \$10,000 or less, no additional deposits shall be required despite the number of hearing sessions. Where the amount in dispute is above \$10,000 and multiple hearing sessions are required, the arbitrators may require any of the parties to make additional deposit for each additional hearing session. In no event shall the aggregate amount deposited per hearing session exceed the amount of the initial deposit as set forth in the above schedule.

(b) A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference, which lasts four (4) hours or less.

(c) The arbitrators, in their awards, may determine the amount chargeable to the parties as forum fees (fees) and shall determine by whom such fees shall be borne. Where the amount in dispute is \$10,000 or less, total fees

to the parties shall not exceed the amount of the total initial deposit deposited by the parties, regardless of the number of hearing sessions conducted. Where the amount in dispute is above \$10,000, total fees chargeable to the parties per hearing session may equal but shall not exceed the amount of the total initial deposit(s) deposited by the parties. Amounts deposited by a party shall be applied against fees, if any. If the fees are not assessed against a party who has made a deposit, the deposit will be refunded. In addition to forum fees, the arbitrator(s) may determine in their awards the amount of costs incurred pursuant to Rules 617, 619 and 624, and unless applicable law directs otherwise, other costs and expenses of the parties and arbitrator(s) that are within the scope of the agreement of the parties or are otherwise permitted by law. The arbitrator(s) shall determine by whom such costs shall be borne.

(d) If the dispute, claim or controversy does not involve or disclose a money claim, the amount to be deposited by the Claimant shall be \$100, or such amount as the director of arbitration or the panel of arbitrators may require but shall not exceed \$1,000.

(e) Any matter submitted and thereafter settled or withdrawn prior to the commencement of the first session shall entitle the parties to a refund of all but \$25 of the amount deposited with the New York Stock Exchange, Inc.

(f) Any matter submitted and thereafter settled or withdrawn subsequent to the commencement of the first session may be subject to such refund of assessed

deposits, if any, as the New York Stock Exchange, Inc. may determine.

(g) The arbitrators may assess forum fees and costs incurred pursuant to Rules 617, 619 and 623 in any matter settled or withdrawn subsequent to the commencement of the first session.

(h) The fees for a pre-hearing<sup>\*</sup> conference with an arbitrator shall be seventy-five (75%) per cent of the fees contained in subsection (a).

#### **Amendment.**

December 6, 1984.

May 20, 1987.

May 10, 1989.

#### **Uniform Arbitration Code**

**Rule 630.** The provisions of the Uniform Arbitration Code contained in Rules 600 through 630 shall also apply to controversies between members, allied members, member firms, member organizations and/or nonmembers who are not public customers, except insofar as such provisions specifically apply to matters involving public customers.

#### **Amendment.**

June 18, 1986.

#### **Renumbered.**

May 10, 1989.

### Schedule for Member Controversies

**Rule 631.** At the time of filing a Submission Agreement, a Claimant shall deposit with the New York Stock Exchange, Inc. the amount indicated below:

	<i>Deposit Per Hearing</i>
\$5000 or less .....	\$200*
\$5000 or more but less than \$100,000 .....	\$750
\$100,000 or more .....	\$1,000

Where the controversy does not involve a money claim, the costs and the amount to be deposited shall be such amount as may be fixed in advance by the Exchange, except that such amount shall not exceed \$1,000 per hearing.

When the controversy is resolved in any way other than by arbitration award, the Exchange shall retain \$25.

**Amendment.**

May 20, 1987.

**Renumbered.**

May 10, 1989.

### Member Controversies

**Rule 632.** Any controversy between parties who are members, allied members, member firms or member corporations shall be submitted for arbitration to members of the Board of Arbitration, unless non-members are also

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\* This shall also be the fee for non-member claimants who are not public customers.

parties to the controversy. If the amount (exclusive of interest and costs) involved in the controversy is less than \$10,000 the controversy shall be heard by one arbitrator. If such amount is \$10,000 or more the controversy shall be heard by at least three but not more than five arbitrators. If nonmembers are also parties to such controversies, the arbitrators shall be appointed in accordance with Rule 607 unless the non-member(s) consent to arbitration before members of the Board of Arbitration.

**Adopted.**

November 30, 1983.

**Amendment.**

June 18, 1986.

**Renumbered.**

May 10, 1989.

### Filing Fee for Member Non-Member Controversies

**Rule 633.** A member organization shall, when filing a claim against a nonmember, pay a non-refundable filing fee of \$500. This fee shall be an addition to all other fees, deposits or costs which may be required.

**Adopted.**

December 6, 1984.

**Renumbered.**

May 10, 1989.



**Board of Arbitration**

**Rule 634.** Promptly after the annual election of the Exchange, the Chairman of the Board of Directors shall appoint, subject to the approval of the Board of Directors, a Board of Arbitration to be composed of such number of present or former members, allied members and officers of member corporations of the Exchange who are not members of the Board of Directors as the Chairman of the Board of Directors shall deem necessary to serve at the pleasure of the Board of Directors or until the next annual election of the Exchange and their successors are appointed and take office.

**Adopted.**

May 20, 1987.

**Renumbered**

May 10, 1989.

**Panel of Arbitrators**

**Rule 635.** The Chairman of the Board of Directors shall from time to time appoint two panels of arbitrators, composed of persons who are residents of or have their places of business in the Metropolitan area of the City of New York. The first of such panels shall be composed of persons engaged in or retired from the securities business and the second of such panels shall be composed of persons not engaged in the securities business. The Chairman of the Board of Directors may likewise appoint panels similar to the panels above described to serve outside the City of New York.

**Adopted.**

May 20, 1987.

**Renumbered.**

May 10, 1989.

**Direction of Arbitration**

**Rule 636.** The Chairman of the Board, shall designate one of the officers or other employees of the Exchange as Director of Arbitration. The Director of Arbitration shall be charged with the duty of performing all ministerial duties in connection with matters submitted for arbitration pursuant to these Rules.

**Adopted.**

May 20, 1987.

**Amended.**

May 10, 1989.

**Requirements When Using Pre-Dispute Arbitration Agreements With Customers**

**Rule 637.** (1) Any pre-dispute arbitration clause shall be highlighted and shall be immediately preceded by the following disclosure language (printed in outline form as set forth herein) which shall also be highlighted:

(a) Arbitration is final and binding on the parties.

(b) The parties are waiving their right to seek remedies in court, including the right to jury trial.

(c) Pre-Arbitration discovery is generally more limited than and different from court proceedings.

(d) The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.

(e) The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with securities industry.

(2) Immediately preceding the signature line, there shall be a statement which shall be highlighted that the agreement contains a pre-dispute arbitration clause. The statement shall also indicate at what page and paragraph the arbitration clause is located.

(3) A copy of the agreement containing any such clause shall be given to the customer who shall acknowledge receipt thereof on the agreement or on a separate document.

(4) No agreement shall include any condition which limits or contradicts the rules of any self-regulatory organization or limits the ability of a party to file any claim in arbitration or limits the ability of the arbitrators to make any award.

(5) The requirements of this section shall apply only to new agreements signed by an existing or new customer of a member or member organization after September 7, 1989.

**Adopted.**

May 10, 1989.

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NOTE: Additional amendments were made to the NYSE Arbitration Rules effective September 10, 1990. *See 55 Fed. Reg. 38181.* These amendments were not available in final published form in time for inclusion in this appendix. Principally, the amendments liberalize the availability of collective proceedings, Rule 612, allow the awarding of interest on awards, Rule 627, and modify the fee provisions, Rules 629, 631 and 633.

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No. 90-18

Supreme Court, U.S.

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CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

ROBERT D. GILMER,  
v. *Petitioner,*

INTERSTATE/JOHNSON LANE CORPORATION,  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

**BRIEF FOR THE  
AMERICAN FEDERATION OF LABOR AND  
CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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IN THE  
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On Writ of Certiorari to the  
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for the Fourth Circuit

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**BRIEF FOR THE  
AMERICAN FEDERATION OF LABOR AND  
CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

---

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 87 national and international labor organizations with a total membership of approximately 18,000,000 working men and women, is filed with the consent of the parties, as provided for in the Rules of this Court.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

The litigants in this case have proceeded, both here and in the lower courts, on the assumption that petitioner's contract comes within the coverage of the United States Arbitration Act, 9 U.S.C. §§ 1-14. On that assumption,

the central legal problem in a case such as this one becomes whether the USAA requires arbitration of petitioner's federal statutory Age Discrimination in Employment Act ("ADEA") claim, or whether, instead, the ADEA incorporates a preclusion of the enforcement of prospective arbitration agreements.

There is, however, a logically prior issue that the parties to this case have not addressed: *The USAA expressly exempts certain types of contracts from its coverage.* The contract in question here may well be within that exclusion. Specifically § 1 of the Arbitration Act states:

Nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce [9 U.S.C. § 1]

Since the contract at issue in this case is one for employment, the question arises whether USAA § 1 takes that contract outside the Arbitration Act's coverage entirely. If so, then the problem of how to reconcile the USAA and the ADEA does not even arise.

This brief is devoted to exploring the scope of the USAA exclusion for "contracts of employment," and takes no position upon the ADEA issue discussed by the parties. Our contention is that this Court need never reach that latter issue because, under the exclusion stated in USAA § 1, essentially *all* employment contracts, including the one in this case, are exempted from the Arbitration Act's coverage. This conclusion is inescapable, we believe, upon careful examination of the Act's language, structure, and legislative history—an examination which, despite the Act's venerable age, has not been undertaken by this Court or the lower courts.<sup>1</sup>

<sup>1</sup> We acknowledge at the outset that because the parties have not questioned the USAA's application to this case, and the issue was

In the argument that follows, we survey the two major issues that have arisen in the lower courts with regard to the scope of the USAA exclusion for contracts of employment: whether "contract of employment" refers only to individual employment contracts, or to collective bargaining agreements as well; and whether the exclusion applies to all contracts of employment that would otherwise be covered by the Act, or only to those in the trans-

not raised as a Question Presented in the Petition for Writ of Certiorari, the Court may feel constrained to pretermitt the coverage issue and proceed on the assumption that the USAA applies. If the Court chooses to proceed in this fashion, we urge that the opinion make clear that the applicability of the Arbitration Act is assumed only because no coverage issue was properly presented for review. *See NLRB v. Curtin Matheson Scientific, Inc.*, 110 S.Ct. 1542, 1550 n.8 (1990) (Court decided a question concerning the proper application of a basic legal standard developed by the National Labor Relations Board, but expressly reserved the threshold issue of whether that standard is a valid one); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981) (Court decided which state limitations period to borrow for a federal cause of action, expressly reserving the question whether, instead, a uniform federal limitations period derived from the NLRA is applicable).

Express recognition of the coverage issue is particularly important in light of this Court's decision in *Perry v. Thomas*, 482 U.S. 483 (1987). In *Perry*, the Court held that the USAA preempted a California statute authorizing civil actions for the collection of wages, despite an agreement to arbitrate. The particular contract at issue there was also an employment contract in the securities field. The parties apparently did not brief the issue whether the contract fell within the exclusionary clause of USAA Section 1, and the Court did not address the issue. Nonetheless, *Perry's* silence on the coverage question has led the lower courts to assume, without examination, the applicability of the Arbitration Act to contracts of employment in the securities industry. *See, e.g., Brown v. Merrill Lynch, Pierce, Fenner & Smith*, 664 F. Supp. 969, 971 (E.D. Pa. 1987) (citing *Perry* and applying Arbitration Act to employment contract involving stock broker). A second decision by this Court which similarly assumes, without discussion, the applicability of the Act would doubtless have the effect of further deterring litigants and the lower courts from giving careful consideration to the scope of the exclusion provision, a result we doubt this Court intended by its silence in *Perry*.



portation industry. The first issue is not directly implicated in this case, since the contract involved is an individual one; nonetheless, the litigation and legislative history of the "contract of employment" exclusion largely concerns collective bargaining agreements, so that some attention to the first question is helpful in framing the problem presented here. The second issue, on the other hand, could be determinative of this case.

1. The question whether or not collective bargaining agreements are covered by the contracts of employment exclusion was widely litigated in the federal courts in cases concerning the enforceability of arbitration clauses in collective bargaining agreements, with conflicting results, before this Court's opinion in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). The question was fully briefed to this Court in *Lincoln Mills*, as an alternative to the question concerning the meaning and effect of § 301 of the Labor Management Relations Act, 29 U.S.C. § 301 that this Court actually decided. Justice Frankfurter in dissent read the Court's silence on the USAA question as indicating that collective bargaining agreements are not covered by the Arbitration Act. Similarly, every federal court of appeals case since *Lincoln Mills*, and this Court in *United Paperworkers v. Misco*, 484 U.S. 29 (1987), have understood collective agreements to be contracts of employment for purposes of the USAA exclusion. Pp. 7-9, *infra*.

2. The seminal case on the second primary question raised by the USAA exclusionary clause is *Tenney Engineering, Inc. v. United Electrical Radio and Machine Workers*, 207 F.2d 450 (3d Cir. 1952) (*en banc*), holding that the clause only applies to the employment contracts of workers who directly transport goods in interstate commerce.

(a) *Tenney* held, first, that the "engaged in commerce" language of the exclusionary provision is to be read as narrower than the "transaction involving commerce" ter-

minology that describes the USAA's affirmative coverage. This approach disregards the different syntactical context in which "involving commerce" and "engaged in commerce" appear; is inconsistent with an opinion of this Court which read the two phrases interchangeable; and, most important, would lead to a seriously anomalous result, leaving within the statute only those employment contracts which *least* implicate the Commerce Clause concerns that justify the statute in the first place. Pp. 10-14 *infra*.

(b) *Tenney* also indicated that the exclusionary language should be read as limited to the transportation industry because the two specific examples in the clause, seamen and railroad workers, are in that industry, and work in jobs covered by federal statutory schemes establishing arbitration mechanisms. This analysis must fail as well: Many transportation industry employees are *not* covered by any special federal statute concerning arbitration, nor is there any reason why Congress would *exclude* from an arbitration enforcement statute only those few industries as to which the federal government had evidenced a special preference for arbitration. Finally, the key statutory interpretation question, in any event, is not the precise scope of the exclusionary language, but whether the scope is *narrower* than the Act's affirmative coverage of transactions "involving commerce," a question which the particular examples used in the exclusionary provision are of no help in answering. Pp. 15-16 *infra*.

(c) Finally, *Tenney* was also incorrect in asserting that the legislative history of the USAA is of no aid in defining the scope of the Act's coverage in the realm of employment contracts. To the contrary, as we demonstrate by reviewing the legislative materials, that history makes abundantly clear that Congress did *not* intend to cover *any* contracts of employment in the Arbitration Act, but meant to affect only commercial contracts. Pp. 16-24 *infra*.



## ARGUMENT

At the time of the enactment of the United States Arbitration Act, the common law prohibited judicial enforcement of agreements to arbitrate, leaving the business community with no enforceable means of settling disputes other than through litigation. The Arbitration Act was passed in response to the urgent need for a less costly and time-consuming means of resolving *commercial* disputes.

Consistent with that focus, the Act applies to "any maritime transaction or a contract evidencing a transaction involving commerce" (USAA § 2, 9 U.S.C. § 2), except that "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" are not covered by the statute (USAA § 1, 9 U.S.C. § 1).

In interpreting the reach of the exclusionary language of § 1 of the Arbitration Act, two major issues have been widely litigated in the lower courts:

Whether the exclusionary language refers to all employment-related contracts, including collective bargaining agreements, or only to individual employment contracts;<sup>2</sup> and whether the exclusion applies to all employment contracts otherwise covered by the statute, or only those concerning employees directly involved in the movement of goods between states and countries.

Only the second of these two issues is directly implicated in this case. Answering that question, however, requires some attention to the first question as well, because much of the case law concerning the "engaged in commerce" question arises in the collective bargaining agreement con-

<sup>2</sup> It has never been suggested, to our knowledge, that the exclusionary clause might cover collective bargaining agreements but not individual employment contracts such as the one in this case, nor can we see any basis for perceiving such a distinction in the statute.

text, and because the legislative history pertinent to the "engaged in commerce" question also largely involves the collective agreement situation. We therefore begin with a brief detour, in order to demonstrate that collective bargaining agreements are outside the Arbitration Act's coverage to the same extent as are individual employment contracts. We then turn to the question as actually raised by this case, and show that the USAA's language, structure, and history all indicate that the Act's provisions were not intended to apply at all in the employment context.

(1) "*Contracts of Employment*": Given the words of USAA § 1, it has never been doubted that the Act's exclusion clause refers to *individual* contracts of employment such as the one in this case.<sup>3</sup> There have been, however, questions raised in the past as to whether or not that term covers collective bargaining agreements.

As of 1956, three Circuits had held that the Arbitration Act's exclusion clause refers to collective bargaining agreements and that such agreements are therefore outside the statute. *Amalgamated Assn. v. Pennsylvania Greyhound Lines*, 192 F.2d 310 (3d Cir. 1951); *United Electrical Workers v. Miller Metal Products, Inc.*, 215 F.2d 221 (4th Cir. 1954); *Lincoln Mills v. Textile Workers Union*, 230

<sup>3</sup> At least one case did suggest that the reference to "workers" in the exclusionary clause language indicates that employment contracts for certain management positions may not be included. *Bernhardt v. Polygraphic Co. of America*, 218 F.2d 948 (2d Cir. 1955). The statute, however, contains no definition of "worker," and this Court expressly declined to reach the question whether the exclusion is thus limited by affirming the USAA aspect of the Second Circuit's opinion in *Bernhardt* on other grounds. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 201 n.3 (1956). Whether or not the plaintiff in this case, a manager of financial services, would be a "worker" under the interpretation of the Second Circuit in *Bernhardt*, would turn in the first instance on a full development of the facts which, it appears, has not yet occurred in this case.

F.2d 81 (5th Cir. 1956), *affirmed*, 353 U.S. 448 (1957). At least two circuits—in an effort to find some statutory basis for enforcing arbitration clauses in collective bargaining agreements that did not present the constitutional problems theretofore thought to lurk in § 301 of the Labor Management Relations Act, 29 U.S.C. § 301—had held otherwise. *Local 205, United Electrical Workers v. General Electric Co.*, 233 F.2d 85 (1st Cir. 1956), *affirmed on other grounds*, 353 U.S. 547 (1957); *Hoover Motor Express Co. v. Teamsters Union*, 217 F.2d 49, 52-53 (6th Cir. 1954).

The application of the USAA exclusionary clause to collective bargaining agreements was therefore one of the issues raised in the petitions for writs of certiorari and discussed at great length in the briefs in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1947) and its companion cases (*see, e.g.*, Brief for the Petitioner in *General Electric Co. v. Local 205, United Electrical Workers*, Oct. Term 1956 No. 276, at 10-30; *id.*, Brief for the Respondent at 43-55).

The opinions for the Court, however, did not address the issue at all. Instead, the Court resolved both the enforceability of arbitration clauses in collective bargaining agreements and the constitutional issues thought to inhere in LMRA § 301 by holding that § 301, standing alone, permits the enforcement of arbitration clauses through the substantive creation of a federal common law of labor agreements. *Textile Workers v. Lincoln Mills*, 353 U.S. at 449-57; *Goodall-Sanford, Inc. v. United Textile Workers*, 353 U.S. 550 (1957); *General Electric Co. v. Local 205, United Electrical Workers*, 353 U.S. 547 (1957).

In dissent, Justice Frankfurter perceived a "rejection though not explicit, of the availability of the . . . Arbitration Act to enforce arbitration clauses in collective bargaining agreements in the silent treatment given that Act by the Court's opinion." *Textile Workers v. Lincoln Mills*, 353 U.S. at 466 (Frankfurter, J., dissenting).

The lower courts have also read this Court's opinion in *Lincoln Mills* as indicating that collective bargaining agreements are indeed "contracts of employment" within the meaning of the exclusionary provision. *See, e.g., American Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 471-72 (11th Cir. 1987). As far as we are aware, every circuit in which the issue has arisen currently adheres to the view implicit in the *Lincoln Mills*—that collective bargaining agreements are "contracts of employment" within the meaning of the USAA exclusion.<sup>4</sup>

Moreover, in *United Paperworkers v. Misco*, 484 U.S. 29 (1987), a case concerning the enforcement of an arbitration clause in a collective bargaining agreement, the Court stated that "[t]he [United States] Arbitration Act does not apply to 'contracts of employment' . . . but the federal courts have often looked to the Act for guidance in labor arbitration cases . . . ." *Id.* at 40 n.9.

After *Misco*, there can be little doubt that USAA's exclusionary clause refers to collective bargaining agreements as well as individual contracts of employment.<sup>5</sup>

<sup>4</sup> *See United Food & Comm. Workers v. Safeway*, 889 F.2d 940, 944 (10th Cir. 1989); *Posadas de Puerto Rico v. Asociacion de Empleados*, 873 F.2d 479, 482 (1st Cir. 1989); *Occidental Chemical Corp. v. International Chemical Workers Union*, 853 F.2d 1310, 1315 (6th Cir. 1988); *see also Bacashihua v. United States Postal Service*, 859 F.2d 402, 404-05 (6th Cir. 1988); *American Postal Workers Union v. United States Postal Service*, *supra* (11th Cir. 1987); *Derwin v. General Dynamics Corp.*, 719 F.2d 484, 488 (1st Cir. 1983); *International Union of Electrical Workers v. Ingram Mfg. Co.*, 715 F.2d 886, 889 (5th Cir. 1983); *American Postal Workers Union v. U.S. Postal Service*, 861 F.2d 211 (9th Cir. 1988); *Service Employees Int. Union v. Office Center Services*, 670 F.2d 404, 406-07 n.6 (3rd Cir. 1982); *Sine v. Local No. 992, Teamsters*, 644 F.2d 997, 1001-02 (4th Cir. 1981); *Pietro Scalzitti Co. v. International Union of Operating Engineers*, 351 F.2d 576 (7th Cir. 1965).

<sup>5</sup> Although the legislative history of the USAA employment exclusion is discussed below as to a different point, we believe that



(2) "*Engaged in Interstate or Foreign Commerce*": Aside from the coverage of collective bargaining agreements issue, the other major controversy that has arisen under the USAA "employment contracts" exclusion, and the one of direct pertinence to this case, is whether the exclusion refers only to employment contracts of employees directly involved in the *movement* of goods in foreign and interstate commerce, and is, on that ground, an exclusion applicable to a narrow range of circumstances.

The most fully reasoned and widely cited lower opinion taking this view is the Third Circuit's 1953 decision in *Tenney Engineering, Inc. v. Electrical Radio and Machine Workers*, 207 F.2d 450 (3d Cir. 1952) (*en banc*); the remaining cases taking a limited view of the reach of the USAA employment contract exclusion simply cite *Tenney* or a decision that summarily relies on *Tenney*.<sup>6</sup> It is therefore appropriate in beginning an inquiry concerning the propriety of this reading of USAA's exclusionary clause to examine the Third Circuit's reasoning in *Tenney*.

that same history also confirms that, as the post *Lincoln Mills* cases uniformly held, collective bargaining agreements are within the USAA exclusion to the same degree as are individual employment contracts.

<sup>6</sup> *Tenney* did not create a uniform following at the time, see e.g. *United Electrical Workers v. Miller Metal Products, Inc.*, *supra*; *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1957), and has gradually lost some of its initial influence, even within the Third Circuit, see e.g. *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969); *Service Employees Int. Union v. Office Center Services*, *supra*, 670 F.2d at 406-07 n.6 (declaring the "advancing lifelessness of the Act in labor arbitration").

It is still true, however, that a number of courts have followed *Tenney* and its progeny, and held that the USAA's exclusion clause is intended to exempt only those workers directly involved in the transportation industry. See, *Signal-Stat Corp. v. Local 476, United Electrical Workers*, 235 F.2d 298, 302 (2d Cir. 1956); *Pietro*

Focussing on the second half of the Arbitration Act's exclusionary clause ("seamen, railroad employees, or any other class of workers engaged . . . in commerce"), *Tenney* read the "engaged in commerce" language extremely narrowly, to refer only to those workers who are directly engaged in the transportation of goods. 207 F.2d at 451-53. In support of this restrictive interpretation, *Tenney* pointed to (a) the narrow understanding of the term "engaged in commerce" at the time the USAA was passed in 1925, and (b) the fact that the two classes of workers referred to expressly (seamen and railroad employees) are in the transportation industry, and were covered at the time by federal statutes providing some mechanism providing for the arbitration of employment disputes.

(a) The problem with the first part of the *Tenney* analysis is that *Tenney* ignores the portion of the Arbitration Act setting out its *affirmative* coverage.<sup>7</sup> As noted,

*Scalzitti Co. v. Operating Engineers*, 351 F.2d 576 (7th Cir. 1965); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2nd Cir. 1972); *Stokes v. Merrill, Lynch, Pierce, Fenner & Smith*, 523 F.2d 433, 436 (6th Cir. 1975); *Miller Brewing v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984); *Tonetti v. Shirley*, 173 Cal. App. 3rd 1144, 1148 (1985).

Other courts have expressly left open the *Tenney* issue. See, *American Postal Workers Union v. United States Postal Service*, *supra*, 823 F.2d at 473 (11th Cir.); *Bacashihua v. United States Postal Service*, *supra*, 859 F.2d at 405 (6th Cir.).

Yet other cases, some in the same circuits as those that have applied the *Tenney* distinction, have assumed the applicability of the USAA exclusionary clause to contracts that would not meet a transportation limitation, without discussing the question. See, *United Food & Comm. Workers v. Safeway*, 889 F.2d 940, 944 (10th Cir.); *Posadas de Puerto Rico v. Asociacion de Empleados*, *supra*, (1st Cir.); see also *Derwin v. General Dynamics Corp.*, *supra*, (1st Cir.).

<sup>7</sup> The reason *Tenney* did not do business with the affirmative statutory coverage in considering the scope of the exclusion was that the Third Circuit was of the view that the limitation on the



USAA § 2 provides that the statute as a whole applies to "any maritime transaction or a contract evidencing a transaction involving commerce." See *Bernhardt v. Polygraphic Co.*, *supra*, 350 U.S. at 201; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967).

Consequently, the key statutory question is not whether the term "engaged in commerce" in USAA § 1 is broad or narrow in the abstract, but whether the reference to employment contracts for employees "engaged in commerce" is broader, is narrower or is coextensive with the "transaction[s] involving commerce" that come within the statute's affirmative coverage.

If the affirmative and exclusionary references are parallel, and both are narrow, then while, as the *Tenney* court held, most employment contracts will not be excluded by virtue of the exemption in USAA § 1, those same contracts will fall outside the Act's affirmative coverage and the ultimate result will be the same: The USAA is deemed to be inapplicable. Cf. *Bernhardt v. Polygraphic Co.*, *supra*, 350 U.S. at 201 & n.3 (no reason to construe the exclusionary clause because there is no evidence that the employment contract in question was one "evidencing a transaction involving commerce.")

If on the other hand, both references in the statute to "commerce" are similarly broad, the affirmative coverage question would ordinarily not arise with respect to employment contracts, because most such contracts would be excluded by USAA § 1.

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affirmative reach of the Act ("involving commerce") did not apply to § 3, the provision at issue in that case, and that, instead, all contracts came within the purview of § 3 regardless of their connection to interstate commerce. Thus, after concluding that the employment contract at issue did not fall within the exemption, the case was over. *Tenney's* view of the reach of USAA § 3 however, proved incorrect. *Bernhardt v. Polygraphic Co.*, *supra*, 350 U.S. at 201.

The answer to the ultimate question whether any employment contracts are governed by the USAA rests or falls, therefore, on whether the affirmative coverage of the Act ("involving commerce") is co-extensive with the reach of the § 1 exemption ("engaged in commerce").

We note at the outset that the different syntactical contexts of the two references to "commerce" mean that use of precisely the same connective in the two circumstances would have created a grammatical problem: a "transaction" could not be said to be "engaged in" commerce, nor would a reference to a "class of workers" as "involving commerce" make sense. Thus, there is no necessary inference to be drawn from the simple fact that a different connective was used in the two contexts.<sup>8</sup> Indeed, this Court's decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, *supra*, proceeds on the understanding that the terms "engaged in commerce" and "involved

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<sup>8</sup> Moreover, it would be ahistorical to suppose that Congress used the very similar terms "involving commerce" and "engaged in commerce" as evidencing a fine-cut distinction in 1925:

Today Congress probably uses [phrases such as "affecting commerce," "engaged in the production of goods for commerce" and "engaged in commerce"] as words of art, but it is hard to believe that they were so understood in 192[5] long before such precise distinctions were introduced by the Court. At that time, no one supposed that there was federal power to regulate employment relations in industries producing goods for commerce or industries affecting commerce, and the phrase "any other class of workers engaged in interstate or foreign commerce" might well have been considered broad enough to reach every contract of employment subject to federal regulation. [Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv. L. Rev. 591, 597-98 (1954) (footnote omitted).]

See also *United States v. American Building Maintenance*, 422 U.S. 271, 279-280 (noting that the term "in commerce" had acquired a particular meaning by 1950, but indicating that before the 1930's this was probably not the case). See also *id.* at 276 (even the contemporary meaning of "in commerce" includes not only the transportation and distribution of goods but also "the practical,

in commerce" were meant to be co-extensive.<sup>9</sup> In that opinion the Court repeatedly used the two terms interchangeably, thus indicating that little hinged on Congress' decision to use slightly different terms in the affirmative and negative sections of the Arbitration Act.<sup>10</sup>

Moreover, interpreting "engaged in commerce" to be narrower than "involving commerce" would create the following paradoxical result: those employment contracts most involving interstate commerce, and most certainly within the Commerce Clause jurisprudence of the day (i.e. contracts in the transportation field), would fall *outside* the Act's coverage; those with *less* direct connection to interstate commerce—viz., those as to which the constitutional authority of the day indicated that federal regulation was suspect—would fall *within* the Act's affirmative coverage and would not be exempt. Limiting coverage to those contracts the *least* evidently within the reach of the federal constitutional authority justifying federal regulation is so anomalous that this Court should not attribute such an intent to Congress without clear evidence pointing in that direction. *Public Citizen v. U.S. Dept. of Justice*, — U.S. —, 109 S. Ct. 2558, 2566 (1989).

economic continuity in the generation of goods and services for interstate markets.").

<sup>9</sup> The issue in *Prima Paint* was whether the Act required arbitration of a claim where one of the parties had been fraudulently induced into entering into the contract requiring arbitration.

<sup>10</sup> See e.g. 388 U.S. at 401 (affirmative coverage of Act applies to contracts "evidencing transactions in commerce"); *id.* ("There could not be a clearer case of a contract evidencing a transaction in interstate commerce." (emphasis supplied)). If the Court attributed any significance to the distinction between workers "in" and transactions "involving" commerce, the Court presumably would not have quoted the language used in the affirmative coverage, substituting "in" for "involving." See also *id.* at 409, 410 & n.3 (Black, J., dissenting) ("involving commerce" is "carefully limited language," suggesting that "Congress did not intend to exert its full power over commerce.").

(b) *Tenney's* second major basis for maintaining that most contracts of employment (including most collective bargaining agreements) are *within* the USAA's coverage—and that the exclusionary language is limited to employees directly involved in moving goods in interstate or foreign commerce—is that the exclusionary language refers to two particular classes of workers (seamen and railroad workers), that work in industries covered by federal statutes providing for the arbitration of employment disputes. This aspect of the *Tenney* analysis fares no better, upon examination, than the other.

For one thing, there is no necessary connection of the kind *Tenney* posits: Many workers directly involved in transporting goods—truck drivers, to take the most obvious example—are *not* in industries in which any special federal arbitration provisions exist, or existed in 1925. Secondly, this aspect of the *Tenney* analysis, as well, produces an anomalous result: Congress would be *excluding* from an Act providing for the enforcement of arbitration contracts, the very classes of workers who were most likely to be covered by congressionally endorsed systems for the arbitration of contractual employment disputes. At the same time, Congress would be *covering* by that Act other workers who were unlikely to be party to arbitration contracts, and as to whom Congress had to that point evidenced no interest in promoting the arbitration of contractual employment disputes. This turns the logic of the situation upside down.

Finally, as we have noted (p. 12, *supra*), the pertinent statutory construction question is not whether the exclusionary provision is broad or narrow, but whether the exclusion is broader than, narrower than, or coextensive with the affirmative coverage of the statute as far as the connection to commerce is concerned. The references to "seamen" and "railroad employer" in the exclusionary clause provide no basis for choosing between these possibilities.



To be sure, Congress *may* have included those particular examples because the Legislature intended to signify that only classes of workers most directly implicating Commerce Clause concerns were to be excluded, leaving contracts of employment for other workers within the Act. Equally plausible, however—and, indeed, more likely, given the anomaly created by reading the statute as *Tenney* suggests (see pp. 11-12, *supra*)—is the hypothesis that the classes of workers Congress named were those the legislature was certain were within the Act's affirmative coverage, but that for the very reasons that lead Congress to make that exclusion the legislature similarly intended to exclude any other classes of workers that might also be deemed to be within the Act's affirmative coverage.<sup>11</sup>

(c) *Tenney* was also in error in another respect: Although the Third Circuit in *Tenney* maintained that "the legislative history furnishes little light on [the statutory construction] point" (207 F.2d at 452), in fact any ambiguity lurking in the statutory language and structure with respect to the relative reach of the Act's affirmative "commerce" coverage and the "contracts of employment" exclusion is resolved by clear legislative history. That history, which has never been surveyed in full detail by this Court, or any other court,<sup>12</sup> establishes an evident intent to assure that *no* employment-related disputes would be subject to the Arbitration Act.

<sup>11</sup> Another possibility is that Congress named the two classes of workers to negate any inference that the federal statute providing arbitration mechanisms with respect to those two groups indicated that Congress did *not* intend seamen and railroad employees to have the benefit of the more general exclusionary language.

<sup>12</sup> The history was, however, fully briefed to this Court in *Lincoln Mills* and its companion cases. Much of the account that follows in the text, indeed, follows the account presented to this Court by the Petitioner in *General Electric Co. v. Local 205, United Electrical Workers*, 353 U.S. 547 (1957).

The advocates of the Arbitration Act were concerned with overturning the rule then prevailing under both state and federal law which denied specific enforcement to arbitration agreements. The Act was drafted and sponsored by the Committee on Commerce, Trade and Commercial Law of the American Bar Association, acting upon instructions from the Association to consider and report upon "the further extension of the principle of commercial arbitration." 45 A.B.A. Rep. 75 (1920).<sup>13</sup> In December 1922, the committee's draft of the federal act was simultaneously introduced as a bill in the Senate (S. 4214) and in the House (H.R. 13522). 64 Cong. Rec. 732, 797 (1922).

As it then stood, § 2 of the bill made valid and enforceable written "provisions for arbitration" in "any contract or maritime transaction or transaction involving commerce," while § 1 defined "commerce" but contained no exclusionary language. When the bill, in this form, came to the attention of Andrew Furuseth, President of the International Seamen's Union of America, he strongly objected to this "compulsory labor" bill and submitted the specific grounds for his condemnation in a lengthy analysis to his Union at its twenty-sixth annual convention. Proceedings of the 26th Annual Convention of the International Seamen's Union of America 203 (1923).

Protests against the bill were also made by the American Federation of Labor ("AFL"). See Proceedings of the 45th Annual Convention of the American Federation of Labor 52 (1925).<sup>14</sup> There is nothing to indicate that

<sup>13</sup> A detailed history of the American Bar Association's efforts in this regard, not repeated here, is set forth at 50 A.B.A. Rep. 356-362 (1925).

<sup>14</sup> While the Seamen's Union, of course, was principally concerned with contracts covering its own members, contracts that would be outside the Act's coverage on any reading of the statute as actually passed, the AFL then, like the AFL-CIO now, included



labor's opposition was limited to the narrow range of labor contracts that would be excluded from the statute under the *Tenney* approach. Rather, as representatives of the Federation later explained, the basis for labor's objection to the bill was the fear that weak unions, or individuals, would be compelled to submit to arbitration clauses, and that the arbitral decision-makers would as a practical matter be under the control of the employers. See 53 A.B.A. Rep. 351-352 (1928).

This fear may seem hard to credit in light of later developments, especially the fact that the labor movement later became the principal supporter of enforceable arbitration under collective bargaining agreements. See, e.g., *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The era in which the USAA was passed, however, was the heyday of labor concern with court interference in labor matters generally, and toward federal court injunctions against unions and employees particularly, concern which later led to the enactment of the Norris-LaGuardia Act. See F. Frankfurter & N. Green, *The Labor Injunction* (1930); 29 U.S.C. § 101 *et seq.* And specific incidents had arisen in the coal mining, building trades and other fields, in which adverse arbitration awards resulted in strikes. See E. Witte, *Historical Survey of Labor Arbitration*, 35-36 (1952).

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member unions in a broad range of industries. And, in fact, unions in many trades and industries, in addition to the seamen, had collective agreements containing arbitration clauses at the time. In the 1920s such provisions were prevalent, for example, in the collective agreements of the garment workers, electrical workers, machinists and mine workers, teamsters, and boot and shoe workers. See 53 A.B.A. Rep. 359 (1928); Milles & Montgomery, *Organized Labor*, 708-713 (1st ed. 1945); E. Witte, *Historical Survey of Labor Arbitration*, 23-26 (1952); Oliver, *The Arbitration of Labor Disputes*, 83 U. of Pa. L. Rev. 206, 213-214 (1934)

Given these circumstances, strong labor opposition to a change which would have altered the common law rule and commanded enforcement of arbitration clauses and awards through court injunctions commanding specific enforcement was not surprising. See, *Amalgamated Association v. Pennsylvania Greyhound Lines*, 192 F.2d 310, 313, (3d Cir. 1951) (noting the "[w]idespread dissatisfaction with compulsion from the federal bench in labor disputes during the era in which the statute was passed" and stating that: "[f]or Congress to have included in the Arbitration Act judicial intervention in the arbitration of disputes about collective bargaining . . . would have created pointless friction in an already sensitive area . . .").

Accordingly, at the hearing on the proposed Arbitration Act before the Senate subcommittee to which the bill had been referred, Mr. Piatt, Chairman of the American Bar Association's Committee on Commerce, Trade and Commercial Law, after referring to the objections of the Seamen's Union, took pains to make it clear that "[i]t was not the intention of this bill to make an industrial arbitration in any sense," (emphasis supplied) and added:

. . . and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, 'but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.' *It is not intended that this shall be an act referring to labor disputes, at all.* It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this. [Hearing before a Subcommittee of the Senate Committee on the Judiciary on S. 4213 and S. 4214, 67th Cong., 4th Sess. 9 (1923) (hereafter "Hearing") (emphasis supplied).]

Consistent with that pronouncement, Senator Sterling, the subcommittee Chairman, referred to the exclusionary clause proposed by Mr. Piatt as follows: "... your suggested amendment in regard to the labor associations; that they shall not be considered." *Id.* at 10.

Further, then Secretary of Commerce Hoover, in a letter to Senator Sterling, Chairman of the Senate Subcommittee, dated January 31, 1923, the day of the hearing, also proposed that an exclusionary clause, worded slightly differently from the one suggested by Mr. Piatt, be inserted. Hearing at 14. Secretary Hoover called attention to "[t]he urgent need of a Federal commercial arbitration act," and, in order to speed the passage of the bill by eliminating labor's objection in the broad field of "workers' contracts," suggested amending the Act by insertion of the present exclusionary language of USAA § 1. *Id.*

At the next session of Congress, the bill was reintroduced in both the House and Senate, but this time the first section of the bill contained the exclusionary language which had been proposed by Secretary Hoover, and which presently appears in USAA § 1. Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646 (hereafter "Joint Hearings") (68th Cong., 1st Sess.) (1924).<sup>15</sup> The subject matter of the committee hearing on the bills was described as "Arbitration of Interstate *Commercial* Disputes" (emphasis supplied) (*id.* at 1), and page after page of the printed record of this hearing reflects the commercial nature of the bill. Over seventy commercial organizations—trade associations, chambers of commerce and bankers' associations—which had endorsed the bill were present at the hearing.

<sup>15</sup> Also, in the definition of "maritime transaction" in § 1, the words "seamen's wages", which had originally been included, were deleted.

In contrast, despite the earlier general opposition, *not* a single labor union appeared, nor was there any testimony or suggestion by anyone that the bill was intended in any way to apply to union or other employment agreements. Both the House and Senate reports on the bill are equally devoid of any indication that arbitration of labor disputes was in any way included. H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924); Sen. Rep. No. 536, 68th Cong., 1st Sess. (1924).

On the floor of Congress, the sponsors of the legislation similarly pointed to the bill's commercial character. Congressman Graham, Chairman of the House Committee on the Judiciary, stated:

This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it.

\* \* \* \*

It creates no new legislation; grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts. [65 Cong. Rec. 1931 (1924).]

And later, Congressman Mills of New York, who had introduced the bill in the House, said in response to a request for an explanation of its provisions:

This bill provides that where there are *commercial* contracts and there is disagreement under the contract, the court can force an arbitration agreement in the same way as other portions of the contract. [65 Cong. Rec. 11080 (1924) (emphasis supplied).]

In short, throughout the history of the Act, the clearly expressed intention was to reach only commercial contracts; *no* labor agreements, in *any* industry, were to be covered.



The Arbitration Act was so understood both shortly after its passage, and for many years afterwards by the business, legal and labor interests that had been most concerned with its enactment. *Cf. Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294 (1933) (contemporary views of officials involved in a statute's enactment are entitled to particular respect.) For example, in 1925, the executive council of the A.F. of L., in referring to the Act in its annual report, stated:

Protests from the American Federation of Labor and the International Seamen's Union brought about an amendment which provides that "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." This exempts labor from the provisions of the law, although its sponsors denied that there was any intention to include labor disputes. [Proceedings of the 45th Annual Convention of the American Federation of Labor 52 (1925).]

Similarly, events in the aftermath of the USAA's passage demonstrate that the exemption was understood to have removed *all* employment contracts from the Act's coverage. In 1926, one year after the Act's passage, the American Bar Association's Committee on Commerce, Trade and Commercial Law, which had drafted and sponsored the Act, began work upon a new bill which *would* apply in the labor field. Noting that "Congress has already enacted a statute providing a method for the settlement of commercial disputes by means of arbitration," the Committee stated that it was "convinced that a similar statute may properly be enacted by Congress providing for the settlement in like manner of industrial disputes..." 51 A.B.A. Rep. 394 (1926).

After two years, during which the Committee held public hearings and conferred extensively with representatives of business, labor and of government, the ABA sub-

mitted a draft of a bill, to make enforceable written agreements made "by an employer or organization of employers with an organization of employees" to submit to arbitration disputes "concerning terms of employment or conditions of labor." 53 A.B.A. Rep. 376 (1928) Pointing out that labor opposition, which had led to the exclusionary language in the Arbitration Act, had prevented "application of the law generally to agreements to arbitrate industrial controversy as well as commercial controversy" (*id.* at 351), the Committee stressed the necessity of taking account of this "state of mind on the part of the workers of the country" in any effort to frame a statute dealing with "arbitration of industrial disputes" (*id.* at 352).

Yet despite the Committee's sensitivity to these concerns, the ABA draft proposal proved to be unacceptable to labor. In 1929 President Green of the American Federation of Labor denounced the measure. 19 *American Federation of Labor Weekly News Services*, No. 5 (April 13, 1929). Accordingly, the Committee concluded, in 1930, that "public opinion is not yet ready for this legislation" and that "it would be a mistake to press it actively at the present time". 55 A.B.A. Rep. 328 (1930).

In 1942, the labor relations issue arose when a bill drafted by Professor Sturges, Chairman of the American Arbitration Association's law committee, to amend the Arbitration Act was introduced in the Senate (S. 2350, 77th Cong., 2d Sess.). 88 Cong. Rec. 2071. Among other things, the bill struck out the exclusionary language of § 1 of the Act and contained a new § 2A expressly covering the enforcement of arbitration agreements between labor organizations, or representatives of employees, and employers. In an explanatory statement accompanying the bill, it was stated that the purpose of the proposed amendment was "extension of the act to embrace written agreements to arbitrate labor controversies." 88 Cong. Rec.



2072 (1942).<sup>16</sup> The bill, however, was never reported by the Committee.

Thus, at the time of the enactment of the Arbitration Act, and for years afterwards, it was well understood that USAA § 1 removed all employment contracts from the Act's coverage. The sponsors of the Act and Congress were thinking exclusively of commercial "transactions": "The farmer who sells his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance." Joint Hearings, *supra*, at 7 (1924). The legislative history refutes the conclusion that only the narrow class of workers involved in the transportation industry were intended to be exempt from the Act's coverage.

In short, all the evidence points to the conclusion that Congress intended to exclude *all* employment contracts, individual and collective, within the transportation industry and throughout other industries, from the coverage of the Arbitration Act. Consequently, the decision below, which assumed that the Act applies generally to contracts of employment in the securities industry is wrong and should be reversed.

<sup>16</sup> The statement continued:

Just as the present act was designed to overcome the common law rules of "revocability" and "nonenforceability" of written agreements to arbitrate commercial controversies arising between the parties, so by section 2A, as proposed, would the act be extended to written agreements to arbitrate labor controversies. [*Id.*]

## CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

ROBERT D. GILMER,

*Petitioner,*

v.

INTERSTATE/JOHNSON LANE CORPORATION,

*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

**BRIEF AMICUS CURIAE OF  
AMERICAN ASSOCIATION OF RETIRED PERSONS  
IN SUPPORT OF PETITIONER**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

No. 90-18

ROBERT D. GILMER,  
v. *Petitioner,*

INTERSTATE/JOHNSON LANE CORPORATION,  
*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF  
AMERICAN ASSOCIATION OF RETIRED PERSONS  
IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than thirty-two million persons age fifty and older. More than eleven million of AARP's members are employed, most of whom are protected by the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 *et seq.*

The aging of the work force and the decreasing number of younger workers entering the work force is enhancing the importance of older workers as a valuable source of labor.<sup>1</sup> Despite these changing demographics,

<sup>1</sup> See Report of the Secretary of Labor, *Older Worker Task Force: Key Policy Issues for the Future* iv (1989).



older workers continue to face discrimination in employment.<sup>2</sup>

More than twenty years ago, Congress enacted the ADEA to eradicate age discrimination in employment and to promote the employment of older workers. 29 U.S.C. § 621(b). Compelling older workers to arbitrate their ADEA claims in order to secure a job circumvents these essential purposes. In this case, the entire securities industry has attempted to insulate its employment practices from the purview of the courts. Older workers will be easy prey for these and other employers who seek to avoid the scrutiny of the courts and the Equal Employment Opportunity Commission (EEOC) by requiring the older workers to sign away their rights to judicial enforcement of the ADEA in order to obtain employment.

Compulsory arbitration provisions contained in employment contracts or applications threaten the protections Congress afforded older workers under the ADEA and undermine the enforcement system Congress designed to eradicate age discrimination from our society. In light of these concerns, AARP respectfully submits this brief *amicus curiae*.<sup>3</sup>

### ISSUE PRESENTED

Whether a claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (1967), is subject to compulsory arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1925) (FAA).

<sup>2</sup> See D.P. O'Meara, *Protecting the Growing Number of Older Workers: The Age Discrimination in Employment Act*, 29 (1989) ("[F]rom 1979 to 1983, the number of age discrimination charges increased by 341 percent"); Spencer's Research Reports on Employee Benefits at 6 (July 20, 1990) (Noting increase in age discrimination charges over the first half of fiscal year 1990, EEOC Chairman Evan J. Kemp stated he is "particularly alarmed at the larger percentage of age discrimination complaints.")

<sup>3</sup> The parties have consented to AARP's filing of this brief; the letters of consent are filed with the clerk.

### STATEMENT OF THE CASE

AARP adopts the Petitioner's statement.

### SUMMARY OF ARGUMENT

The question presented by this case is whether employers may compel employees to arbitrate statutory claims under the ADEA pursuant to a predispute arbitration clause contained in an employment contract.<sup>4</sup> The district court below held that compulsory arbitration of ADEA claims was contrary to the ADEA and could not preclude *de novo* judicial review based on this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Appendix to Petition for Writ of *Certiorari* at 41a-42a. The Court of Appeals for the Fourth Circuit reversed, finding that nothing in the language, legislative history, or underlying purposes of the ADEA overrides the policy favoring arbitration set forth in the Federal Arbitration Act (FAA). *Id.* at 3a.

AARP respectfully submits that the FAA does not apply to employment contracts. Section 1 of the Federal Arbitration Act excludes from the Act "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. When considered in its historical context and viewed in light of its legislative history, there is no doubt that Congress enacted this provision for the express purpose of excluding all employment contracts from the reach of the Act.

Even if the Court finds that the FAA applies to employment disputes, compulsory arbitration inherently

<sup>4</sup> This case does not involve a voluntary agreement after a dispute has arisen to resolve statutory claims by arbitration. In a post-dispute agreement, the parties agree on the issues and claims in dispute and the employee makes a deliberate choice of forums in which to resolve his claims. See Coulson, *Fair Treatment: Voluntary Arbitration of Employee Claims*, 33 Arb. J. 23, 29 (1978).

conflicts with the purposes and structure of the ADEA. Congress enacted the ADEA to eradicate age discrimination in employment. 29 U.S.C. § 621(b). To best accomplish this societal purpose, Congress gave the courts broad injunctive authority to remedy and prevent discrimination in employment. 29 U.S.C. §§ 626(b), (c). Arbitration lacks this societal effect because it is typically limited to the particular dispute between the parties and does not have far reaching effects on other members of the protected class. Industry-wide arbitration of employment disputes prevents achievement of the congressional objective of eliminating discrimination from our society.

Congress designed the ADEA to provide victims of discrimination the choice of a variety of forums in which to resolve their claims. 29 U.S.C. §§ 626(b), (c), & (d). Compulsory arbitration takes this choice away from the employee and gives it instead to the employer, contrary to the statutory scheme Congress established. The older worker who needs a job has no choice but to acquiesce to the employer's demands in order to get the job.

The far reaching effects of the Court's decision in this case cannot be overstated. Whole industries will attempt to remove themselves from the purview of the courts and enforcement agencies by including compulsory arbitration provisions in employment applications and contracts. The multitude of statutes protecting employees' rights will be subject to the vagaries of individual arbitrators. Surely, Congress could not have intended such a result.

## ARGUMENT

### INTRODUCTION

Until the decision of the Court of Appeals for the Fourth Circuit below, the circuit courts of appeals had consistently held that employment discrimination claims could not be subject to compulsory arbitration under the Federal Arbitration Act, 9 U.S.C. § 1. See *Alford v. Dean Witter Reynolds*, 905 F.2d 104 (5th Cir. 1990); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 842 (1990); *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3d Cir. 1989); *Swenson v. Management Recruiters International, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S. Ct. 143 (1989). These courts had not questioned the underlying issue of whether the FAA even applies to arbitration clauses in employment contracts. Similarly, the parties below did not question whether the FAA applies to disputes between employers and employees.

The application of the FAA to employment contracts has apparently not been an issue for two reasons. First, this Court's opinions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984), have been viewed as controlling authority on the issue of whether arbitration clauses in employment contracts could deny an employee *de novo* judicial review of claims arising under employment or discrimination statutes.

Second, the early case law interpreting the FAA narrowly construed the exclusion of employment contracts in Section 1 to apply only to workers in the transportation industry, based on an incomplete review of the legislative history of the FAA. *Tenney Engineering, Inc. v. United Electrical Radio and Machine Workers*, 207 F.2d 450 (3d Cir. 1953) (*en banc*). See *Dickstein v. DuPont*,



443 F.2d 783 (1st Cir. 1971); *Pietro Scalziti Co. v. International Union of Operating Engineers*, 351 F.2d 576 (7th Cir. 1965); *Signal-Stat Corp. v. Local 475, United Electrical Radio and Machine Workers*, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957).

Thirty-three years ago, this Court was presented with comprehensive arguments asserting that the exclusion of employment contracts in Section 1 of the FAA was inserted into the Act for the express purpose of ensuring that the FAA would not apply to any employment contracts. See Briefs in *General Electric Co. v. Local 205, United Electrical Radio and Machine Workers of America (U.E.)*, 353 U.S. 547 (1957); *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957); *Goodall-Sanford, Inc. v. Textile Workers of America Local 802*, 353 U.S. 550 (1957). Rather than resolving the issue under the FAA, the Court ruled that arbitration clauses in collective bargaining agreements were specifically enforceable under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1947). *Id.* Justice Frankfurter would have ruled explicitly that the FAA simply did not apply to collective bargaining agreements based on the legislative history. *Textile Workers of America v. Lincoln Mills*, 353 U.S. 448, 460, 466-69 (1957) (Frankfurter, J., dissenting).

Once again, the applicability of the FAA to employment contracts confronts the Court. Whether the FAA applies to employment contracts depends on the interpretation of Section 1 of the Act, which excepts certain contracts, as well as on the interpretation of Section 2 of the Act, which makes contracts to arbitrate covered by the Act enforceable. Thus, whether all employment contracts are excluded from the FAA is a subsidiary issue within the question on which *certiorari* was granted. While the parties before the court of appeals below did

not brief whether Section 1 applied to this case,<sup>5</sup> the issue is central to the resolution of the case and to the question upon which *certiorari* was granted.

# **I. THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO EMPLOYMENT CONTRACTS.**

The Court has never squarely addressed the meaning of the language in FAA § 1 excluding contracts of employment from the Act.<sup>6</sup> The legislative history plainly reveals that the exception for contracts of employment in Section 1 of the FAA was added for the express purpose of excluding all worker contracts from the Act.

<sup>5</sup> Gilmer argued in the district court that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), controlled this case and prevailed. In defending that ruling in the court of appeals, Gilmer did not argue, as an alternative ground for affirmance, that Section 1 of the FAA excludes employment contracts from the Act.

<sup>6</sup> The Court left open the meaning of the exclusion in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956). The Court stated that an employment contract was not covered by § 2 because there was no evidence that in performing duties under the contract, the employee "was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions." 350 U.S. at 200-01. The Court expressly did not reach the issue of the scope of the exclusion in Section 1. 350 U.S. at 201 n.3.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 n.9 (1967) the Court cited Section 1 as authority for the point that "categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act."

In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court ruled that the FAA preempted a California statute authorizing civil actions for the collection of wages regardless of any agreement to arbitrate such a dispute. The Court declined to address the argument that the arbitration provision contained in the employment contract was unenforceable as a contract of adhesion. 482 U.S. at 492 n.9. The issue of the scope of the Section 1 exclusion for employment contracts was not briefed by the parties nor addressed by the Court.



As an initial matter, there is no dispute that the advocates supporting the enactment of the FAA were businessmen whose sole concern was to overturn the common law rule which denied specific enforcement of agreements to arbitrate in contracts between businessmen.<sup>7</sup> The Act was drafted and sponsored by the Committee on Commerce, Trade and Commercial Law of the American Bar Association,<sup>8</sup> acting upon instructions from the Association to consider and report upon "the further extension of the principle of commercial arbitration." 45 A.B.A. Rep. 75 (1920).

In December 1922, the Committee's proposal was simultaneously introduced as a bill in the Senate (S. 4214) and in the House (H.R. 13522). 64 Cong. Rec. 732, 797 (1922).

As introduced, Section 2 of the bills made written "provisions for arbitration" enforceable in "any contract or maritime transaction or transaction involving commerce." *Id.* Section 1 contained no exception for contracts of employment and defined commerce and "maritime transactions." The definition of maritime transactions included agreements relating to "seaman's wages" and any other matter within admiralty jurisdiction.

At the Seamen's Union Convention in 1923, Andrew Furuseth, president of the Seamen's union, announced his concern that the Federal Commercial Arbitration bill could be applied to preclude seamen from bringing dis-

<sup>7</sup> H.R. Rep. 96, 68th Cong., 1st Sess. 1-2 (1924). See *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing Before A Subcommittee on the Judiciary on S.4213 and S. 4214*, 67th Cong., 4th Sess. (1923), at 9 (Statement of W.H.H. Piatt) (hereinafter "Senate hearing").

<sup>8</sup> See 50 A.B.A. Rep. 356-362 (1925) for a detailed history of the American Bar Association's efforts to overturn the common law rule.

putes arising out of their employment to court.<sup>9</sup> He warned:

Let a clause to arbitrate be placed in any contract and any dispute about the meaning and enforcement of the contract must be referred to arbitration and the court with all the Saxon rule of procedure and constitutional guarantees ceases to operate . . . . Place in the contract to labor—that any disagreement shall be attributed by the Shipping Commission (under existing statutes this includes consuls) and the seaman's right to wages, to food, to damages under the Jones Act together with his present right to quit work in harbor becomes void. With the seaman, the machinery is there and ready. The shipowner only needs this bill to become law and slavery is restored without any other noise, except such as the victim may make . . .

<sup>9</sup> Seamen sign individual contracts of employment, and in the early 1920's, those contracts typically provided that any disputes between an individual seaman and the ship owner or its agent would be decided by a shipping commissioner and that decision would be binding on the courts. *Proceedings of the Twenty-Fourth Annual Convention of the International Seamen's Union of America*, 27-28 (1921).

Mr. Furuseth had taken issue with the arbitration clauses being inserted into the shipping articles which individual seamen were required to sign:

The one provision found in nearly all of these insertions to the effect that the Shipping Commissioner shall act as arbitrator of any or all disputes and that such decision as he may make shall be final is intended to deprive the seaman of the right to appeal to the courts. The Shipping Commissioners Act gives no such power to the Commissioner, unless there is a submission in writing and such submission is made after the dispute has arisen and not prior to entering into the agreement. It has no right in the articles. I have discussed this clause with the Commissioner of Navigation and he admitted that it is not strictly according to law; but if the men are not willing to sign such clause they need not. This is nothing short of inviting the men to strike to get the law enforced. If the seaman does this, all the blame is heaped on him.

*Id.* at 28-9.

*Proceedings of the Twenty-Sixth Annual Convention of the International Seamen's Union of America, 203-04 (1923).*<sup>10</sup>

At the Senate Judiciary subcommittee hearings on the bill, Chairman Sterling asked W.H.H. Piatt, chairman of the ABA committee responsible for drafting the bill to respond to the concerns expressed by Mr. Furuseth. Mr. Piatt assured the Chairman that the bill was never intended to apply to any employer-employee disputes. He emphasized:

Now, it was not the intention of the bill to have any such effect. It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, 'but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.' *It is not intended that this shall be an act referring to labor disputes, at all.* It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

Senate hearing, at 9 (Statement of W.H.H. Piatt) (emphasis added). Senate Judiciary Committee Chairman Sterling and Senator Walsh shared both this concern and Mr. Piatt's understanding of the bill. Senate hearing, at 10-12 (Remarks of Sen. Sterling, Sen. Walsh).

At the Senate hearing, Senator Walsh was particularly concerned that the Act not apply to contracts of employment. He stated:

<sup>10</sup> Mr. Furuseth was also concerned that if the union agreed to arbitration clauses in a collective bargaining agreement, the result would bind the members. *Id.*

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily [sic] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says, 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Senate hearing, at 9 (Remarks of Sen. Walsh).

To alleviate the concern that the commercial arbitration bill could apply to employment disputes, Secretary of Commerce Herbert Hoover proposed language to exempt contracts of employment from the bill. In a letter introduced by Chairman Sterling, Secretary Hoover recommended:

If objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'

Senate hearing at 14.

While the original Senate bill was not reported out of committee in the 67th Congress,<sup>11</sup> an amended bill was reintroduced in the 68th Congress as S. 1005 and in the House as H.R. 646, 68th Cong., 1st Sess. (1924).<sup>12</sup> At joint

<sup>11</sup> There was no hearing in the House on the companion bill, H.R. 13522, and it was not reported out of Committee, either.

<sup>12</sup> As introduced in the 68th Congress and referred to the judiciary committees, the FAA made written provisions to arbitrate enforceable in "any contract or maritime transaction or transaction involving commerce." S.1005, 68th Cong., 1st Sess., § 2 (1924);



hearings before the Senate and House Judiciary Subcommittees, Mr. Piatt testified that in light of the desire to clearly exclude employment contracts as expressed by Senators Sterling, Walsh and other members, the ABA had redrafted the bill. *Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 10-11 (1924) (Joint Hearings).*

As redrafted by the ABA and introduced into the 68th Congress, the bill added the exact language to Section 1 that Secretary Hoover had suggested be used to exempt workers' contracts from the Act.<sup>13</sup> Also, the inclusion of "seamen's wages" within the definition of maritime transaction in Section 1 was deleted.

The legislative proceedings of the Federal Commercial Arbitration bill clearly demonstrate that the scope of the bill was limited to arbitration involving commercial transactions. At the Joint Hearings, more than seventy commercial organizations—trade associations, chambers of commerce and bankers' associations—that had endorsed the bill were represented. Not a single labor union appeared. There was no testimony nor any suggestion that the bill was in any way intended to apply to individual contracts of employment or collective bargaining agreements.

On the floor of the Congress, House Judiciary Committee Chairman Graham described the bill's commercial character:

H.R. 646, 68th Cong., 1st Sess., § 2 (1924). This language was changed in the Senate Judiciary Committee to make enforceable written provisions to arbitrate "any maritime transaction or a contract evidencing a transaction involving commerce." S. Rep. 536, 68th Cong., 1st Sess. (1924). The substitute language was proposed by Sen. Walsh for grammatical, not substantive, reasons. 66 Cong. Rec. 2761 (1925) (remarks of Sen. Sterling).

<sup>13</sup> Secretary Hoover sent another letter to the Senate Judiciary Committee Chairman (Senator Brandegee), urging the adoption of the bill, expressing the same views he had expressed to Senator Sterling and enclosing a copy of the prior letter. Joint hearings, at 20-21.

The bill simply provides for one thing, and that is to give an opportunity to enforce an agreement *in commercial contracts* and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it.

\* \* \*

It creates no new legislation; grants no new rights, except a remedy to enforce agreements *in commercial contracts* and in admiralty contracts.

65 Cong. Rec. 1931 (1924) (emphasis in text).

At the time, the business, labor and legal interests most affected by the FAA all viewed the Act as inapplicable to contracts of employment. Business representatives did not champion the FAA to create a federal law binding employers to arbitrate employment disputes with individual employees. Also, the American Federation of Labor did not view the FAA as applying to union contracts. In describing the FAA in its 1925 annual report, the Executive Council of the Federation stated:

Protests from the American Federation of Labor and the International Seamen's Union brought about an amendment which provides that 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' This exempts labor from the provisions of the law, although its sponsors denied that there was any intention to include labor disputes.

*Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor, 52 (1925).*

The very next year, the same ABA Committee on Commerce which had drafted the FAA started work on a bill that would similarly enforce agreements to arbitrate in the labor arena. Noting that "Congress had already enacted a statute providing a method for the settlement of commercial disputes by means of arbitration," the Committee stated that "it was convinced that a similar statute may properly be enacted by Congress providing



for the settlement in like manner of industrial disputes." 51 A.B.A. Rep. 394 (1926). Organized labor opposed the idea as another example of the hated labor injunction. 19 *American Federation of Labor Weekly News Service*, No. 5 (April 13, 1929). As a result, the ABA Committee on Commerce concluded in 1930 that "public opinion is not yet ready for this legislation" and that "it would be a mistake to press it actively at the present time." 55 A.B.A. Rep. 328 (1930).

The clear meaning of the legislative history of the FAA is that Congress intended to exclude all employment contracts from the reach of the FAA, both individual contracts and collective bargaining agreements.<sup>14</sup>

Recent cases have addressed whether the FAA applies to disputes arising under collective bargaining agreements. In *United Paperworkers International Union v. Misco*, 484 U.S. 29, 40 n.9 (1987), the Court indicated that Section 1 excluded collective bargaining agreements from the FAA, and did not limit the exclusion to workers in the transportation industry as did early circuit courts of appeals.<sup>15</sup> Recent decisions of the courts of appeals

<sup>14</sup> There can be no doubt that in his employment, Gilmer was "engaged in interstate commerce." The securities broker's work is the trading of securities in interstate commerce. The proper inquiry is whether the class of workers to which the worker belongs engages in interstate commerce, not whether the individual worker is actually engaged in interstate commerce. *Bacashihua v. United States Postal Service*, 889 F.2d 402, 405 (6th Cir. 1988) (postal workers are employees in interstate commerce within the meaning of Section 1 of the FAA). Thus, no issue is presented here concerning the meaning of the phrase "engaged in commerce" within Section 1 of the FAA. See *Second Employers' Liability Cases*, 223 U.S. 1, 51-2 (1912).

<sup>15</sup> See, *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America Local 437*, 207 F.2d 450 (3d Cir. 1953) (*en banc*). In *Tenney*, the United States Court of Appeals for the Third Circuit found only a reference in a 1923 ABA com-

for the First, Third, Sixth and Eleventh Circuits also have not limited the exclusion to workers in the transportation industry. See *Derwin v. General Dynamics Corp.*, 719 F.2d 484, 488 n.3 (1st Cir. 1983); *Service Employees International Union Local 36 v. Office Center Services, Inc.*, 670 F.2d 404, 406 n.6 (3d Cir. 1982); *Bacashihua, v. United States Postal Service*, 859 F.2d 402, 404-05 (6th Cir. 1988); *American Postal Workers Union v. United States Postal Service*, 823 F.2d 466 (11th Cir. 1987).

Accordingly, as Section 1 of the FAA excludes Petitioner's contract of employment from the reach of the Act, the court of appeals was incorrect in ruling that the FAA requires compulsory arbitration of Petitioner's employment discrimination claim.

## II. COMPULSORY ARBITRATION INHERENTLY CONFLICTS WITH THE PURPOSES AND STRUCTURE OF THE ADEA.

As this Court has recognized, not "all controversies implicating statutory rights are suitable for arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985). To determine whether statutory claims may be subject to arbitration, a court must consider whether the text, legislative history, and purposes of the underlying statute reflect an "inten[t] to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987). While the Court

mittee report to the exclusion, and did not review any of the legislative history discussed herein.

The federal courts of appeals for the First, Second, and Seventh Circuits followed *Tenney* without independent analysis. See *Dickstein v. DuPont*, 443 F.2d 783 (1st Cir. 1971); *Pietro Scalziti Co. v. International Union of Operating Engineers*, 351 F.2d 576 (7th Cir. 1965); *Signal-Stat Corp. v. Local 475, United Electrical Radio and Machine Workers*, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957).

has interpreted the FAA to require arbitration of commercial disputes, the Court has also emphasized that the statutory rights of employees raise significantly different considerations which may override the policy encouraging arbitration. See *Atchison, Topeka and Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 565 (1987). The purposes and structure of the ADEA demonstrate that compulsory arbitration inherently conflicts with the ADEA.<sup>16</sup>

**A. Compulsory Arbitration Conflicts with the Congressional Purpose of Eradicating Employment Discrimination from Society.**

Congress enacted the ADEA to "prohibit arbitrary age discrimination in employment" because such discrimination was pervasive in society. 29 U.S.C. §§ 621(a), (b).<sup>17</sup> To achieve this objective, Congress provided for broad prohibitions, extensive remedies, and administrative and judicial enforcement. 29 U.S.C. §§ 626(b), (c), (d).

Authorizing the courts to issue broad injunctive relief is the cornerstone to eliminating discrimination in society. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975). Injunctions allow the courts to prevent employers from discriminating against other employees and from engaging in other unlawful employment practices. Class-wide relief changes employment practices—a benefit to many members of the protected class who may not even be plaintiffs in the suit.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), the Court relied on statutory provisions granting injunctive and affirmative relief in Title VII of the

<sup>16</sup> Nothing in the text or legislative history of the ADEA references resolution of claims pursuant to private arbitration.

<sup>17</sup> "We do find substantial evidence of . . . discrimination based on unsupported general assumptions about the effect of age on ability . . . ." See Report of the Secretary of Labor, *The Older American Worker*, reported in *Legislative History of the Age Discrimination in Employment Act*, at 5 (1965).

Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to demonstrate that Congress assigned to the courts "plenary powers to secure compliance" with the statute. In civil rights cases, "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Alexander v. Gardner-Denver Co.*, 415 U.S. at 45. The Court viewed the significance of injunctive relief in accomplishing the statutory purpose as strong evidence of congressional intent that judicial resolution of discrimination claims could not be displaced by arbitration. *Id.*

The ADEA shares the same goal as Title VII of eliminating discrimination from the workplace, *Lorillard v. Pons, Inc.*, 434 U.S. 575, 584 (1978), and similarly authorizes the courts to award broad injunctive relief to achieve the purposes of the Act. 29 U.S.C. § 626(b). As in other civil rights statutes, the provision for injunctive relief in the ADEA reflects Congress' intent to eliminate age discriminatory practices on a sweeping, class-wide basis. See *Lorillard v. Pons, Inc.*, 434 U.S. at 584. Such relief generally benefits other older workers in the protected class and achieves the congressional objective of eradicating discrimination in employment.

In contrast, commercial arbitration of disputes lacks the societal premise and broad purpose that underly the civil rights statutes. Commercial arbitration is typically limited to a specific dispute between the particular parties. See American Arbitration Association, *Commercial Arbitration Rule 17* (1981); Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an 'Adequate Substitute' for the Courts?*, 68 Texas L. Rev. 509, 568 (1990). The available remedies are usually limited to the individual and generally do not provide for injunctive relief. See Shell, 68 Tex. L. Rev. at 568.



Similarly, arbitration does not provide for class-wide participation or relief to redress class-wide policies or practices. Coulson, *Fair Treatment: Voluntary Arbitration of Employee Claims*, 33 Arb. J. 23, 29 (1978). The representative class action mechanism is central to enforcement of the ADEA because it allows similarly situated individuals to join together in litigation. See *Hoffman-La Roche Inc. v. Sperling*, — U.S. —, 110 S. Ct. 482 (1989). These limitations on the nature and extent of the remedies available in arbitration make it ill-suited for accomplishing the broad congressional purpose of eradicating age discrimination from our society.

**B. The Statutory Purpose of Protecting Employees from the Inequalities of the Employment Relationship Warrants Against the Use of Compulsory Arbitration.**

Nothing in the Court's recent approval of arbitration of commercial disputes<sup>18</sup> suggests that the Court has overruled or retreated from its previous holdings that arbitration of an employment dispute may not bar employees from pursuing their statutory claims in court. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).<sup>19</sup> Indeed, the Court's most recent examination

<sup>18</sup> See *McMahon*, 482 U.S. 220 (1987) (upheld arbitration agreement between customers and brokerage firm; claims under the Securities Exchange Act of 1934, SEC Rule 10b-5, and the Racketeer Influenced and Corrupt Organizations Act (RICO)); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, — U.S. —, 109 S. Ct. 1917 (1989) (upheld arbitration agreement between securities investors and brokerage firm; claims under the Securities Act of 1933 and the Securities Exchange Act of 1934); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985) (upheld arbitration agreement between securities investors and broker-dealer; claims under state law.)

<sup>19</sup> While *Barrentine* and *Alexander* involved the arbitration of claims under collective bargaining agreements, the Court's analysis of whether arbitration precludes judicial review is instructive in the case of individual employment contracts. In *Barrentine* and

of compulsory arbitration of an employment dispute reaffirms the Court's commitment to upholding judicial review of claims deriving from statutes designed to provide workers with minimum federal protections.

In *Atchison, Topeka and Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987), a unanimous Court relied on its previous holdings in *Barrentine* and *Alexander* to conclude that a claim under the Federal Employers' Liability Act for personal injuries was not precluded by the availability of arbitration under the Railway Labor Act. While the Court gave due deference to the strong national policy favoring arbitration, it reiterated that

different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

480 U.S. at 565, quoting *Barrentine*, 450 U.S. at 737.

*Alexander*, the Court analyzed the inherent conflict between arbitration and the purposes and structures of the statutes, which is analogous to the current analysis used by the Court. See *McMahon*, 482 U.S. at 227. While the Court's recent decisions call into question the portions of *Barrentine* and *Alexander* that express a distrust of the arbitration system and the authority of the arbitrator, those considerations are not central to their analyses.

Nor is there any basis for distinguishing *Barrentine* and *Alexander* because the claims subject to arbitration were contractual and not statutory. The contractual claims mirrored the statutory claims upon which the employees later brought suit. See *Barrentine*, 450 U.S. at 732 (claim for wages under the collective bargaining agreement were compensable under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1938)); *Alexander*, 415 U.S. at 42 (collective bargaining agreement prohibited race discrimination similar to Title VII's prohibition). In holding that arbitration of contractual claims did not preclude litigation of the employee's statutory rights in *Barrentine* and *Alexander*, the Court implied that statutory rights could not be subject to arbitration when arbitration was compelled by the collective bargaining agreement. Similarly here, arbitration is compelled by the employer and the securities industry.



An essential difference between employment contracts and commercial contracts is the inherent inequality in the employment relationship, which Congress and this Court have historically recognized as requiring greater protections for employees. The relationship between employer and employee simply does not involve the same type of equal bargaining or mutual decisionmaking that exists in the relationship between buyer and seller.

The foundation of this nation's labor laws is to remedy the inequality of bargaining power between the individual employee and his employer. Congress recognized this fundamental concern in enacting the Norris-LaGuardia Act, finding that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment . . ." 29 U.S.C. § 102 (1932).<sup>20</sup>

More recently, Congress reiterated this concern in disapproving of waivers under the ADEA outside the supervision of a court or the Equal Employment Opportunity Commission. Senator Melcher, Chairman of the Senate Select Committee on the Aging emphasized the

inherently different bargaining power of employers and employees. There will always be employees who feel that if they do not sign a waiver they will not only be out of a job, but also will forfeit any present or future benefits to which they may otherwise be entitled.

S. Rep. 79, 101st Cong., 1st Sess. 7 (1989) (quoting 133 Cong. Rec. S.14383 (daily ed. Oct. 15, 1987)).

This Court has similarly recognized the inherent inequality between employees and employers as a fundamental underpinning of employment statutes. Finding

<sup>20</sup> Even when employees gain collective power by organizing unions, the interests of the individual employee may not be adequately protected. See *Alexander v. Gardner-Denver Co.*, 415 U.S. at 59.

that a waiver of rights under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1938) (FLSA), was contrary to public policy, the Court admonished that "employers might be able to use superior bargaining power to coerce employees to . . . waive their protections under the Act." *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 302 (1985). Justice O'Connor shared this concern in the case of a state statute intended to protect employees "from the exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system for redress of an employment grievance." *Perry v. Thomas*, 482 U.S. 483, 495 (1987) (O'Connor, J., dissenting).

The "agreement" to arbitrate at issue in this case is contained in the "Uniform Application for Securities Industries Registration Form," which all employees who deal in securities before the exchanges must sign. Appendix to Petition at 40a. The arbitration provision does not state that it applies to claims under federal or state employment laws. Appendix to Petition at 41a. Such arbitration provisions are typically mandatory and non-negotiable. See Baxter and Hunt, *Alternative Dispute Resolution: Arbitration of Employment Claims*, 15 Empl. Rel. L. J. 187, 191 (1989). An individual who wants to work in the securities industry has no choice but to sign the form or seek employment elsewhere—an alternative that is not readily available to many older workers.<sup>21</sup>

In an employment discrimination case, the very entity accused of violating the employee's rights, the employer, determines and controls the forum and the manner in which the employee's civil rights will be resolved. This glaring anomaly was of great concern to Chief Justice

<sup>21</sup> See Report of the Secretary of Labor, *Labor Market Problems of Older Workers* 21 (1989). The chance of reemployment declines significantly with age. *Displaced Older Workers: Hearing Before the Select Comm. on Aging*, 99th Cong., 1st Sess. 46 (1985).

Burger who explained his vote in *Alexander v. Gardner-Denver Co.*:

Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.

*Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting).

The same concern applies here, where the employer accused of discrimination and the employer's industry mandate arbitration and unilaterally establish all of the rules and terms of the process. Arbitrators in these cases are members of the securities industry themselves and therefore may not be impartial. See *Shell*, at 569. In the ADEA,<sup>22</sup> Congress sought to counteract the superior power of the employer and the inherent bias in a system controlled by the employer by establishing *de novo* judicial review to insure an independent and objective resolution of the claim.

### C. Compulsory Arbitration Eliminates the Employee's Choice of Forum Which the ADEA Safeguards.

The ADEA embodies a panoply of enforcement provisions which make arbitration incompatible with the stat-

<sup>22</sup> Recent amendments to the ADEA reaffirm the importance of the protections Congress has consistently provided to employees to insure that their rights are secure. The Older Workers' Benefit Protection Act, Pub. L. 101-433, Title II, amends the ADEA to establish stringent standards for releases, settlements, and waivers. *Id.* The Act applies to waivers executed after the date of enactment, Pub. L. 101-433, Title II, § 202, and was signed into law on October 16, 1990. *President Signs Betts Bill Extending Age Bias Protection to Benefit Plans*, Daily Lab. Rep. (BNA) No. 202, at A-3 (Oct. 18, 1990).

utory scheme. First and foremost, the ADEA grants the individual plaintiff a variety of choices of forum to obtain relief for the discrimination he has suffered. 29 U.S.C. §§ 626(b), (c), (d), 633.

It is the employee, not the employer, who initiates the administrative process either before the EEOC or a state agency. It is the employee, not the employer, who decides when and where to seek judicial relief, as the ADEA permits the employee to abandon the administrative process and proceed in court any time after sixty days have elapsed from the filing of the charge of discrimination. 29 U.S.C. § 626(d). It is the employee, not the employer, who subsequently decides to proceed in federal or state court. These choices are denied the employee and awarded instead to the employer by the predispute arbitration provision.

Congress sought to safeguard not only a wide range of choices, but insured that even preliminary action taken in a nonjudicial forum would not preclude an ultimate decision by the courts. When Congress adapted Title VII's administrative scheme to the ADEA, it provided that administrative review and determinations would not affect the individual's right to *de novo* review by the courts. As the Court recognized in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 470 n. 7 (1982):

Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a state's own courts.

Similarly, the courts have held that a state administrative determination does not preclude a *de novo* federal court action. *Id.*; *University of Tennessee v. Elliott*, 478 U.S. 788 (1986); *Solimino v. Astoria Federal Savings & Loan Assoc.*, 901 F.2d 1148 (2d Cir. 1990); *petition for*



*cert. filed*, No. 89-1895 (May 30, 1990); *Duggan v. Board of Education*, 818 F.2d 1291 (7th Cir. 1987); *contra Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988).

Enforcing a compulsory arbitration provision eliminates the employee's right to choose the appropriate forum and precludes *de novo* judicial review. These effects of compulsory arbitration plainly conflict with the multiforum structure Congress designed for the ADEA, and make compulsory arbitration incompatible with the Act.

### III. REQUIRING COMPULSORY ARBITRATION OF EMPLOYMENT CLAIMS WOULD ELIMINATE WHOLE CATEGORIES OF EMPLOYEES AND STATUTORY CLAIMS FROM THE PURVIEW OF THE COURTS.

The Court's decision in this case will have far-reaching effects on the enforcement of numerous federal employment statutes such as Title VII, 42 U.S.C. § 2000e *et seq.*, the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, the Employee Retirement Security Income Act, 29 U.S.C. § 1001 *et seq.*, the Equal Pay Act, 29 U.S.C. § 206(d) *et seq.*, and the newly enacted Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA). The circuit courts of appeals that have considered this issue unanimously relied on *Alexander v. Gardner-Denver* to preclude arbitration of Title VII claims and ADEA claims until the decision below.<sup>23</sup> A ruling by this Court requir-

<sup>23</sup> See *Alford v. Dean Witter Reynolds*, 905 F.2d 104 (5th Cir. 1990); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 842 (1990); *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3d Cir. 1989); *Swenson v. Management Recruiters International, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S. Ct. 143 (1989); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1553 (10th Cir. 1988); *Johnson v. University of Wisconsin-Milwaukee*, 783 F.2d 59 (7th Cir. 1986); *Criswell v. Western Airlines, Inc.*, 729 F.2d 544, 547-49 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985).

ing compulsory arbitration of ADEA claims would have to naturally restrict or overrule *Alexander v. Gardner-Denver* due to the similarities between Title VII and the ADEA.

Requiring compulsory arbitration of statutory employment claims would effectively exempt entire industries from the scrutiny of the courts and enforcement agencies regarding their employment practices. See *Nicholson v. CPC International, Inc.*, 877 F.2d 221, 231 (3d Cir. 1989). The securities industry has made a concerted effort to enforce the arbitration provision in its registration form by making it mandatory and non-negotiable. A ruling by this Court sanctioning the use of such contracts of adhesion would encourage other industries and employers to adopt similar arbitration provisions.

Since decisions of individual arbitrators do not have precedential effect, employees would be forced to litigate issues over and over again as there would be no legal precedent to prevent employers from engaging in recurring discriminatory practices. Enforcing compulsory arbitration provisions contained in employment applications or contracts would emasculate the ADEA and thwart the congressional goal of eradicating discrimination. Only by rejecting compulsory arbitration and preserving the employee's right to *de novo* judicial review will the Court give full effect to that laudable goal.



**CONCLUSION**

AARP respectfully submits that the decision of the Fourth Circuit should be reversed and the case remanded to the district court for further proceedings on Petitioner's ADEA claim.

Respectfully submitted,

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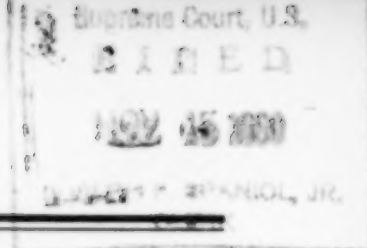
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①  
No. 90-18



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

ROBERT D. GILMER,

v.

*Petitioner,*

INTERSTATE/JOHNSON LANE CORPORATION,

*Respondent.*

On Writ of Certiorari To the United States  
Court of Appeals for the Fourth Circuit

**BRIEF FOR THE LAWYERS' COMMITTEE FOR  
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AMICUS CURIAE IN SUPPORT OF THE  
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## QUESTION PRESENTED

Whether an employee who signs a pre-employment contract with his employer to arbitrate any claims between the parties bargains away his right to have his federal statutory claims of discrimination adjudicated in the courts?



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## INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law submits this brief as *amicus curiae* urging reversal of the decision by the Court of Appeals for the Fourth Circuit in *Gilmer v. Interstate/Johnson Lane Corporation*, 895 F.2d 195 (4th Cir. 1990).<sup>1</sup>

The Lawyers' Committee is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in the national effort to insure civil rights to all Americans. It has represented and assisted other lawyers in representing numerous plaintiffs in administrative proceedings and lawsuits under Title VII. *E.g.*, *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561 (4th Cir. 1985); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). The Lawyers' Committee has also represented parties and participated as an *amicus* in Title VII cases before this Court. *E.g.*, *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

The question presented by this case raises important and recurring issues in all civil rights cases. Whether claims brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1990). ("ADEA") are subject to compulsory arbitration is an issue that potentially affects every case of employment discrimination brought under a

<sup>1</sup> Pursuant to Rule 37.3, written consents of the parties to the submission of this brief as *amicus curiae* are on file with the Clerk of the Supreme Court.



federal employment discrimination statute which provides for resolution of claims through the courts, and particularly Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e to -17 (1990), the principal focus of the Lawyers' Committee's activities.

This Court's decision will undoubtedly have far reaching and important implications for present and future employment discrimination cases in which the Lawyers' Committee participates. Moreover, the Lawyers' Committee has a long-standing interest in persuading the Court to adopt principles that will result in the sound administration of the discrimination laws, so that findings of liability will be obtainable by persons with legitimate claims and limited resources. Finally, the Lawyers' Committee also brings the Court the benefit of its actual experience in litigating numerous employment discrimination cases, and is therefore in a position to discuss the relative advantages and disadvantages of resolution of such cases through arbitration as opposed to the court system.

### SUMMARY OF ARGUMENT

In *Gilmer*, the Fourth Circuit Court of Appeals held that this Court's decisions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, (1987); and *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed. 2d 526 (1989) endorsing arbitration as a means to resolve commercial disputes had *sub silentio* overruled this Court's well-established pronouncements that arbitration cannot be a compulsory remedy in employment rights cases. *E.g.*, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S.

728 (1981), *cert. denied*, 471 U.S. 1054 (1985) (Fair Labor Standards Act); *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (28 U.S.C. § 1983).

The Fourth Circuit's ruling is wrong and should be reversed by this Court.<sup>2</sup> *First*, the Fourth Circuit failed to recognize, contrary to this Court's express holdings in *Gardner-Denver*, *Barrentine* and *McDonald*, that employment rights cases are different from commercial disputes. There are public interests at issue in civil rights cases that mandate public resolution in the courts, with the full panoply of procedural rights and remedies available there that arbitration simply does not provide. In short, *Gardner-Denver* and its progeny are still good law and the Fourth Circuit erred by assuming they had been silently overruled by *Mitsubishi*, *McMahon* and *Rodriguez*.

*Second*, the Fourth Circuit's ruling ignores the fact that, as this Court explained in *Gardner-Denver*, however well-suited arbitration might be for the resolution of private commercial disputes, arbitration is not an appropriate forum for adjudicating civil rights violations.

*Third*, the Fourth Circuit's holding ignores the fundamental inequality in bargaining between employers and employees. It cannot fairly be assumed that prospective waivers by individual employees of court remedies in favor of arbitration are knowing or voluntary.

<sup>2</sup> Indeed, it is worth noting that every Circuit that has considered the issue has ruled exactly opposite to *Gilmer* and refused to order compulsory arbitration in employment rights cases. *E.g.*, *Alford v. Dean Witter Reynolds*, 905 F.2d 104 (5th Cir. 1990) (Title VII); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, U.S. , 110 S. Ct. 842 (1990) (Title VII); *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3d Cir. 1989) (ADEA); *Swenson v. Management Recruiters International, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, U.S. , 110 S. Ct. 143 (1989) (Title VII); *Johnson v. University of Wisconsin - Milwaukee*, 783 F.2d 59 (7th Cir. 1986) (ADEA).

Finally, the Fourth Circuit's approach to statutory interpretation is artificial and stilted. In effect, the Fourth Circuit ruled that, unless Congress had expressly stated that court remedies could not be waived by an agreement to arbitrate, *Mitsubishi* and the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-15 (1990), require the strict enforcement of private contracts to arbitrate. That ruling ignores the FAA's own exclusion of employment disputes from its reach and, even more significantly, Congress' oft-expressed insistence on the necessity for court remedies for civil rights violations as set forth in, among other places, Title VII and its legislative history.

In this *amicus* brief, we focus the foregoing arguments on the Title VII model. This Court has often observed that the substantive provisions of the ADEA are "derived in *haec verba* from Title VII" and that Title VII precedents apply "with equal force" to ADEA claimants. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Oscar Mayer and Co. v. Evans*, 441 U.S. 750, 756 (1979); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Indeed, the similarities between the ADEA and Title VII are substantial. Both statutes seek to eliminate discrimination in the work place, albeit on different bases; both statutes rely upon the conciliation procedures of the Equal Employment Opportunity Commission ("EEOC"); and both statutes provide for civil actions in the courts to remedy and enjoin discriminatory employment practices and procedures. Compare 42 U.S.C. § 2000e-2(a)(2) (1990) and 29 U.S.C. § 623(a)(2) (1990); 42 U.S.C. § 2000e-5(f) (1990) and 29 U.S.C. § 626(b) (1990); and 42 U.S.C. § 2000e-5(f) (1990) and 29 U.S.C. § 626(d) (1990). Moreover, the Lawyers' Committee has extensive experience in litigating Title VII cases in the trial and appellate courts. That experience convincingly demonstrates that, contrary to the Fourth Circuit's ruling, employment rights cases—whether brought under ADEA, Title VII or any other civil rights statute—belong in the courts, not compulsory arbitration.

In sum, we respectfully submit that this Court should reaffirm *Gardner-Denver*, *Barrentine* and *McDonald* and reverse the Fourth Circuit's decision in *Gilmer*.

## ARGUMENT

### I. THE FOURTH CIRCUIT'S DECISION ALLOWING COMPULSORY ARBITRATION OF ADEA CLAIMS DISREGARDS THIS COURT'S HOLDINGS IN *GARDNER-DENVER*, *MCDONALD*, AND *BARRENTINE* AND IS CONTRARY TO THE LEGISLATIVE INTENT OF FEDERAL CIVIL RIGHTS STATUTES.

In *Gilmer*, the Fourth Circuit held that this Court's recent endorsement of private arbitration in commercial cases in *Mitsubishi*, *McMahon* and *Rodriguez* effectively overruled this Court's earlier rejection of compulsory arbitration in the employment rights area in *Gardner-Denver*, *Barrentine* and *McDonald*. *Gilmer*, 895 F.2d at 201-02. The Fourth Circuit further held that, applying the statutory interpretation test espoused by *Mitsubishi*, it could find no evidence in ADEA of a Congressional preference for court remedies over arbitration. The Fourth Circuit also summarily rejected the argument that civil rights cases are different from commercial disputes with respect to the federal court's deference to arbitration. Accordingly, the Fourth Circuit enforced a broadly worded arbitration clause in the employment contract signed by Mr. Gilmer six years before he was allegedly terminated unlawfully due to his age, and sent him to arbitration.<sup>3</sup>

The Fourth Circuit first stated its broad reading of *Mitsubishi* and its progeny:

<sup>3</sup> This appeal thus addresses the enforceability of *prospective* waivers of judicial remedies. It does not implicate agreements to arbitrate reached *after* the dispute has arisen.



In a trilogy of recent cases, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L.Ed. 2d 444 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332, 96 L.Ed. 2d 185 (1987); and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, U.S. 109 S. Ct. 1917, 104 L.Ed. 2d 526 (1989), the Supreme Court has endorsed arbitration as an effective and efficient means of dispute resolution . . . . An arbitration agreement is unenforceable [under *Mitsubishi* and its progeny] only if Congress has evinced an intention to preclude waiver of the judicial forum for a particular statutory right, or if the agreement was procured by fraud or use of excessive economic power.

895 F.2d at 196-97.

The Fourth Circuit next rejected the contention that ADEA's text or legislative history evidenced a preference for a judicial forum:

We find nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements. Arbitration is nowhere mentioned in the text of the statute, and "[t]his silence in the text is matched by silence in the statute's legislative history." . . . Moreover, we see no conflict between arbitration and the underlying purposes of the ADEA which would preclude arbitration of ADEA claims.

895 F.2d at 197 (citations omitted).

The Fourth Circuit also summarily dismissed the continued vitality of *Gardner-Denver* and its line of cases:

Gilmer points to three cases decided before the Supreme Court's recent trilogy and argues that those cases are controlling here [citing *Gardner-Denver*, *Barrentine* and *McDonald*] . . . .

We find these cases inapposite. First, none of the three even mention the FAA . . . .

Second, *Gardner-Denver*, *Barrentine* and *McDonald* all involved arbitration under collective bargaining agreements . . . [C]oncern about the divergent interests of employee and union simply does not exist where, as in Gilmer's case, the individual employee has agreed to arbitration . . . .

For the foregoing reasons we think it clear that *Gardner-Denver*, *Barrentine*, and *McDonald* do not control our decision here.

895 F.2d at 201-02.

Finally, the Fourth Circuit rejected the notion that there is a distinction between commercial disputes and employment rights cases for purposes of enforcing arbitration agreements:

We remain sensitive to the fact that the context in which this case arises differs somewhat from the contexts of *Mitsubishi*, *McMahon* and *Rodriguez*. Whereas the statutes in those cases were primarily commercial in focus, the ADEA is a civil rights statute. Moreover, the complainants in those cases were securities customers and persons injured by anti-trust violations, not employees who are allegedly victims of discrimination in the workplace. Although the beneficiaries of statutory protections may vary, the principles of statutory interpretation do not.



895 F.2d at 203.

The Fourth Circuit's reasoning, we respectfully submit, is fatally flawed. Civil rights actions, unlike private commercial disputes, involve public interests that require judicial resolution; for that reason alone, *Gardner-Denver* and its progeny remain good law, notwithstanding the *Mitsubishi* trilogy of cases. Moreover, as this Court properly recognized in *Gardner-Denver*, arbitration simply does not provide adequate procedural and substantive protections for civil rights cases. Nor can it be said that individual employees, such as Mr. Gilmer, knowingly and voluntarily waived their right to a judicial forum for their civil rights claims. Finally, the statutory language and legislative history of the FAA and civil rights statutes such as Title VII evidence an unambiguous Congressional preference for judicial remedies.

**A. *There are Significant Differences Between Civil Rights and Commercial Disputes That Warrant a Lesser Deference to Arbitration.***

The substantive issue in *Mitsubishi* was a breach of contract and antitrust dispute between an automobile manufacturer and a car dealer. *Mitsubishi*, 473 U.S. at 616-20. Similarly, the underlying substantive issues in both *McMahon*, 482 U.S. at 222 and *Rodriguez*, 490 U.S. 477, 104 L.Ed. 2d 526, 533, were alleged violations of the securities laws. At bottom, each of those cases centered upon a private litigant's claim for money damages.<sup>4</sup>

<sup>4</sup> Indeed, the *Mitsubishi* Court rejected a claim by the plaintiff that its antitrust claim raised important public policy issues that should not be sent to private arbitration:

Notwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties by § 4

(footnote continues)

As this Court has often stated, however, civil rights cases are different. Civil rights cases necessarily implicate issues of public importance that require the public forum of a courtroom and the wide discretion that only a court has to fashion remedies that go beyond the interests of the private litigants in order to eradicate employment discrimination in this country. Civil rights issues should not be addressed in the relative privacy of arbitration before decisionmakers empowered only to resolve the particular private dispute before them. Thus, in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), this Court noted in the Title VII context that: "The primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens'." *Id.* at 348-49 (citations omitted).

In *Teamsters*, this Court emphasized the importance of the courts in enforcing Title VII's legislative mandate to eradicate discrimination:

In *Griggs v. Duke Power Co.*, and again in *Albermarle*, the Court noted that a primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees

(footnote continued)

of the Clayton Act, 15 U.S.C. § 15 and pursued by Soler here by way of its third counterclaim, seeks primarily to enable an injured competitor to gain compensation for that injury.

*Mitsubishi*, 473 U.S. at 635.

Similarly, in *McMahon*, this Court rejected the argument that claims brought under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962 *et seq.*, involved public policy issues that should not be sent to arbitration, holding that RICO claims are also mere private money damages claims. *McMahon*, 482 U.S. at 240-42.

over other employees . . . . An equally important purpose of the Act is 'to make persons whole for injuries suffered on account of unlawful discrimination.' In determining the specific remedies to be afforded, a district court is 'to fashion such relief as the particular circumstances of a case may require to effect restitution.'

Thus, the Court has held that the purpose of Congress in vesting broad equitable powers in Title VII courts was "to make possible the 'fashion[ing] [of] the most complete relief possible,' and that the district courts have 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'"

*Id.* at 364 (citations omitted). See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 420-21 (1975) ("Congress' purpose in vesting a variety of 'discretionary' powers in the courts was . . . to make possible the fashion[ing] [of] the most complete relief possible").

In short, in each and every civil rights employment case, there is a public interest present that goes beyond simply making the plaintiff-victim whole and requires the fashioning by a court of a broad remedy designed to prevent any further discrimination. It is the public policy of the United States, as enacted in Title VII, ADEA and other civil rights statutes, to eliminate discrimination from the workplace. That public policy can only be vindicated in the courts; the private remedy of arbitration can never adequately address that public interest. As this Court succinctly stated in *Gardner-Denver*:

The private right of action remains an essential means of obtaining judicial enforcement of Title VII. In such cases, the private litigant not only

redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.

*Gardner-Denver*, 415 U.S. at 45 (citations omitted; emphasis added).

**B. The Courts are Far Better Suited Than Private Arbitrators to Adjudicate Employment Discrimination Claims.**

As this Court expressly held in *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984)—which, notably, was decided only one year before *Mitsubishi*—"although arbitration is well-suited to resolving contractual disputes . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 [and other civil rights statutes are] designed to safeguard."

First, the federal courts have greater expertise in adjudicating Title VII claims. While arbitrators are experienced in labor contract and other commercial disputes, they are not, as a group, well versed in the complexities of Title VII jurisprudence. Moreover, arbitrators perform a role different from courts in that they are charged with effectuating the intent of the parties under a contract rather than enforcing the requirements of ADEA, Title VII or any other civil rights statute. See *Gardner-Denver*, 415 U.S. at 57. Indeed, where the collective bargaining agreement or other employment contract conflicts with the dictates of ADEA or Title VII, the arbitrator must apply the provisions of the agreement to enforce its terms. As this Court observed in *McDonald*, the arbitrator's expertise "pertains primarily to the law of the shop, not the law of the land." 466 U.S. at 290; see also *Barrentine*, 450 U.S. at 743; *Gardner-Denver*, 415 U.S. at 57. As noted in *Gardner-Denver*:



Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

415 U.S. at 57.

Second, unlike judges, a "substantial proportion of . . . arbitrators are not lawyers." *Barrentine*, 450 U.S. at 743 n. 21. These non-lawyer arbitrators cannot be expected to be familiar with the extensive body of law interpreting Title VII. Issues arising under Title VII, ADEA and other civil rights statutes must be resolved in light of volumes of legislative history and decades of legal interpretation. Though an arbitrator may be competent to resolve many preliminary factual questions, he may lack the competence to decide the ultimate legal issue in a civil rights case. See *Barrentine*, 450 U.S. at 743. That lack of competence is unacceptable in cases of such paramount public concern.

In addition, even if competent to resolve the complex legal issues presented by civil rights cases, arbitrators can add nothing to the development of the law in the civil rights area, and may even detract from that development. Arbitration decisions are not often publicly reported and they consequently cannot contribute to either the public knowledge of discrimination law or the ever-growing body of decisions that guide law-abiding employers in their personnel decisions. Further, because arbitrators are not bound by the principles of *stare decisis*, they necessarily will detract from legal certainty in the employment discrimination field. Thus, mandatory submission of Title VII and ADEA claims to arbitration

will frustrate rather than further the "legislative purposes" of federal civil rights statutes, which "require[s] . . . the principled application of standards consistent with those purposes . . . . Important national goals would be frustrated by a regime of discretion than 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.'" *Albermarle*, 422 U.S. at 417 (citation omitted).

Third, unlike the courts, arbitrators lack the authority to enforce fully the important individual rights protected by Title VII. An arbitrator's power is both derived from, and limited by, the collective bargaining agreement or other contract. *McDonald*, 466 U.S. at 290; *Barrentine*, 450 U.S. at 744; *Gardner-Denver*, 415 U.S. at 53. Arbitrators lack the broad discretionary power granted to the courts by Title VII and ADEA. In *Gardner-Denver*, this Court recognized the severe limitations on the authority of the arbitrator to stray from the employment agreement to invoke public laws that conflict with the contract between the parties:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

415 U.S. at 53 (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)); see also *McDonald*, 466 U.S. at 291-92; *Barrentine*, 450 U.S. at 744. Accordingly, if the individual rights guaranteed by ADEA or Title VII conflict with the parties' employment agreement, the arbitrator must enforce the agreement even if



to do so requires a ruling contrary to the public policies underlying Title VII. *McDonald*, 466 U.S. at 291; *Barrentine*, 450 U.S. at 744.

Arbitrators also lack the power that courts have to hold a recalcitrant defendant in contempt, both during and after Title VII or ADEA actions, for willfully refusing to obey court orders. 42 U.S.C. § 2000e-5 (1964).

Fourth, subsequent judicial review of an arbitrator's decision is severely limited. An arbitrator's decision is final and binding on the employer and employee, thereby prohibiting *de novo* review by the courts. *Gardner-Denver*, 415 U.S. at 54. Moreover, arbitrators have no obligation to any reviewing court to give reasons for their decision or award. See *McDonald*, 466 U.S. at 290-91; *Gardner-Denver*, 415 U.S. at 57-58. Accordingly, the role of the appellate courts in developing and articulating the important public policies at issue in Title VII, ADEA and other civil rights cases would be sharply circumscribed, if not almost entirely eliminated, by a rule that allowed employers routinely to insert enforceable arbitration clauses into employment contracts.

Finally, the procedural tools available to Title VII, ADEA and other civil rights claimants in judicial proceedings are not available in arbitration, which is, as a result, an inadequate substitute for judicial factfinding. *McDonald*, 466 U.S. at 291-92; *Barrentine*, 450 U.S. at 738; *Gardner-Denver*, 415 U.S. at 57-58. As the *McDonald* Court observed:

[A]rbitral factfinding is generally not equivalent to judicial factfinding. As we explained in *Gardner-Denver*, "[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-

examination, and testimony under oath, are often severely limited or unavailable." 415 U.S. at 57-58, 94 S. Ct. 1011, 39 L.Ed. 2d 147.

466 U.S. at 291.

The absence of court procedures in arbitrations limits the remedies available under ADEA, Title VII and other civil rights statutes and promotes inefficiency, if not injustice. For example, the class action device under Rule 23 of the Federal Rules of Civil Procedure provides for the resolution of multiple claims of discrimination in a single action. The class action procedure also permits the court to fashion a class-wide remedy affecting numerous employees nationwide. There is no similar procedure in arbitration. Absent the class action device, many meritorious employment discrimination complaints may well go unremedied, either because (a) none of the individual claims warrants the expense of a contested arbitration proceeding or (b) the lack of any possible attorneys' fee award discourages lawyers from bringing such claims on behalf of discrimination victims.

In sum, as this Court has already recognized, arbitration is not an appropriate forum for the resolution of the critically important public and private interests at stake in employment discrimination cases. *Gardner-Denver* and its progeny were correctly decided; the Fourth Circuit erred in concluding that *Mitsubishi*, *McMahon* and *Rodriguez sub silentio* overruled those decisions; and this Court should reaffirm the continued viability of *Gardner-Denver* and its line of cases.

**C. *The Inequality of Bargaining Leverage Between Employers and Employees Justifies Less Deference to the FAA.***

In *Gilmer*, the Fourth Circuit distinguished *Gardner-Denver* and its progeny, in part, on the ground that those cases arose in the context of collective bargaining agreements,

whereas this case arises out of an individual employment contract. 895 F.2d at 201. That distinction misses the point. The individual employment contract situation presents a more, not less, compelling reason to disfavor a claimed waiver of judicial remedies in favor of arbitration.

Unlike the usual presumption in commercial cases, it is virtually always the case in employment rights disputes that the employer has substantially greater bargaining leverage than does the employee. That is, in fact, the fundamental premise of this nation's labor laws. As Congress recognized in enacting the Norris-La Guardia Act, "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment." 29 U.S.C. § 102 (1973). See also *Barrentine*, 450 U.S. at 735.

Thus, when an employer insists upon a broad arbitration clause in an individual employment contract, the employee ordinarily has little choice but to agree and, in most instances, little knowledge of the statutory rights he is giving up. Contrary to the Fourth Circuit's conclusion, that is all the more reason to be suspicious of arbitration clauses in individual employment contracts and to hold, as this Court did in *Gardner-Denver*, that an employee's right to a judicial forum in civil rights cases is "not susceptible of prospective waiver." 415 U.S. at 51-52.

**D. The Text and Legislative History of the FAA and Title VII Amply Demonstrate a Congressional Preference for a Judicial Remedy.**

Even in commercial cases, the *Mitsubishi* decision recognized that the presumption in favor of arbitration is not irrebuttable:

That is not to say that all controversies implicating statutory rights are suitable for arbitration.

There is no reason to distort the process of contract interpretation, however, in order to ferret out the inappropriate. Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

*Mitsubishi*, 473 U.S. at 627.

In the employment context, there is ample evidence in the text and legislative history of the FAA and Title VII to lead inescapably to the conclusion that employment discrimination cases should be heard in the courts, rather than in arbitration. For that reason alone, the Fourth Circuit's decision in *Gilmer* should be reversed.

**1. The FAA exempts employment disputes.**

The Fourth Circuit's decision in *Gilmer* was expressly predicated on the "federal policy favoring arbitration" enacted in the Federal Arbitration Act. *Gilmer*, 895 F.2d at 201. Section 1 of the FAA, however, explicitly excludes from the Act all "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added).

The unambiguous intent of Section 1 of the FAA is to exempt from the federal policy favoring arbitration employment contracts of workers engaged in interstate commerce.<sup>5</sup>

<sup>5</sup> The purpose of Section 1 to exclude all employment contracts from the FAA is apparent from the plain language of the statute. That purpose is confirmed by the legislative history of Section 1 which is discussed in detail in the *Amicus* Brief of the American Association of Retired Persons.



Although some courts of appeals long ago held that Section 1 of the FAA applied only to workers in the transportation industry, that conclusion was based upon an incomplete reading of the legislative history and ignored the plain language of Section 1. See, e.g., *Tenney Engineering, Inc. v. United Electrical, Radio and Machine Workers' of America*, 207 F.2d 450 (3d Cir. 1953) (*en banc*). More recently, however, this Court and several lower federal courts have recognized that the employment contract exemption of Section 1 of the FAA is far broader than the transportation industry and in fact covers collective bargaining agreements in all industries engaged in interstate commerce. See, e.g., *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 n.9 (1987); *Occidental Chemical Corp. v. Int'l Chemical Workers Union*, 853 F.2d 1310, 1315-16 (6th Cir. 1988); *American Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 469 (11th Cir. 1987); *Derwin v. General Dynamics Corp.*, 719 F.2d 484, 488 n.3 (1st Cir. 1983). Although the issue has not yet arisen in any decision by this Court, it is equally clear that Section 1 of the FAA exempts individual employment contracts. In short, Section 1 of the FAA itself evidences Congress' intent to exempt employment rights disputes from compulsory arbitration.

2. *The legislative history of Title VII evidences a clear preference for judicial remedies.*

In enacting Title VII, the model for ADEA,<sup>6</sup> Congress made plain that its purpose in passing employment rights legislation was not just to adjudicate private wrongs and remedies but also to eradicate discrimination at all levels of employment, nationwide. As the 1964 Report of the House Committee on Education and Labor explained:

<sup>6</sup> As discussed above, the legislative history and judicial construction of Title VII are directly relevant to the interpretation of ADEA, as this Court has often recognized. See p. 4, *supra*.

The committee finds that testimony received regarding the need for this legislation could scarcely be more cogent and convincing. The conclusion inescapably to be drawn from 98 witnesses in 12 days of hearings, held in various sections of the country as well as in Washington, and from many statements filed without oral testimony, is that in all likelihood fully 50 percent of the people of the United States in search of employment suffer some kind of job opportunity discrimination because of their race, religion, color, national origin, ancestry, or age. It should be made clear that the evidence poured in from all parts of the Nation - East, West, North, and South. This act cannot then be viewed as an act intended merely to correct abuses in any one section of the country. *Clear enunciation and implementation of a national policy on equal employment opportunity are obviously long overdue at this point in the history of the United States.*

\* \* \*

*In short, this act proposes active steps toward achievement of basic constitutional and moral transforming from the theoretical into the actual the fundamental principles which are the very foundation of American democracy - and undertakes to remove deficiencies and to attain positive benefits necessary to internal well-being and to continued world leadership.*

H.R. Rep. No. 1370, 87th Cong., 2d Sess. 1-2, 5(1962), (reprinted in *Legislative History of Titles VII and XI of Civil Rights Act of 1964* at 2155-56, 2159 (emphasis added)).

In enacting Title VII, Congress relied upon the availability of federal court actions to achieve its goal of eliminating employment discrimination. As explained by Mr. Justice Powell, writing for the Court in *Gardner-Denver*:



Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin . . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit . . . .

Even in its amended form, however, Title VII does not provide the Commission with direct powers of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions. *Rather, final responsibility for enforcement of Title VII is vested with federal courts.* The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices . . . . *Taken together, these provisions make plain that federal courts have been assigned plenary powers to secure compliance with Title VII.*

415 U.S. at 44-45 (citations omitted; emphasis added).

Indeed, the legislative history of the 1972 Equal Employment Opportunities Enforcement Act is replete with references to the particular qualities of federal courts which, in Congress' judgment, made them the best forum for adjudicating civil rights cases. For example, the 1972 House Committee on Education and Labor Report states:

The problem Title VII seeks to correct is not one susceptible to the kind of policy balancing that is usual in the administration of law regulating utilities or other situations involving competing interests. Racial discrimination does not occupy the status of an "interest" under our system of law. It is a grave injustice which should be eliminated in as quick and efficient a manner as possible.

\* \* \*

*The appropriate forum to resolve civil rights questions, questions of employment discrimination as well as such matters as public accommodations, school desegregation, fair housing, and voting rights, is a court.* Civil rights issues usually arouse strong emotions. United States district court proceedings provide procedural safeguards: Federal judges are well known in their areas and enjoy great respect; the forum is convenient for the litigants and is impartial; the proceedings are public, and the judge has power to resolve the problem and fashion a complete remedy.

\* \* \*

*The district court approach has a great advantage over an administrative hearing procedure in securing the needed evidence.* The Federal Rules of Civil Procedure, with respect to discovery, would greatly facilitate the collection of evidence for trial . . . . Discovery procedures take less time than administrative fact-gathering techniques, and the contempt powers of the court operate to inhibit any intimidation of witnesses, which is a rather difficult problem that is often real, but seldom apparent.

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 62-63 (1971), (reprinted in *Legislative History of the Equal Employment Opportunity Act of 1972* at 62-63) (1972) (emphasis added) (hereinafter "1972 Act Legis. Hist.").

During Congressional debate of the 1972 amendments to Title VII, Congress' insistence on the availability of a federal court remedy was frequently expressed. Thus, in favoring judicial enforcement over cease and desist power vested in the EEOC, Congressman Erlenborn noted:

There are those who say that the cease-and-desist approach is much preferable; that the courts cannot do the job of guaranteeing equal opportunity for employment . . . . [I]f the courts are so inefficient and unable to grant relief in this area, why is it that over the past many years great strides have been made in the civil rights field primarily through [the] Federal courts?

1972 Act Legis. Hist. at 248.

Congressman Gerald R. Ford made a similar observation:

In this kind of situation [Title VII cases], discretion is very, very important. I happen to believe the system of justice in the courts is a better forum for that, rather than leaving it in the hands of an agency which has the right to investigate, to prosecute, to make a decision and then to enforce it. I strongly prefer the use of the courts for enforcement, rather than the agency itself.

1972 Act Legis. Hist. at 263.

Likewise, in the Senate, Senator Dominick, the leading proponent of an amendment requiring federal court enforcement instead of agency cease and desist power, explained his preference for a judicial remedy as follows:

This approach is superior for several reasons. First it provides a combination of the expertise of the EEOC in investigating, processing, and conciliating unfair employment cases with the expertise and independence of the Federal courts. The equal employment area is one which produces strong emotions among all parties . . . . *I believe that these strong emotions should be tempered by restraint when the adjudication of rights is at issue. The Federal courts are best able to provide the tempering restraint which will allow for a rational resolution of the issues of any given case.*

1972 Act Legis. Hist. at 333.

\* \* \*

There are many advantages to allowing the courts to decide whether or not a charge [of discrimination] has been substantiated and then let it issue and enforce the cease-and-desist order. *First of all, it is a fact that the courts have done a good job in dealing with civil rights questions, including Title VII questions. This use of the courts would assure an impartial tribunal, thus guaranteeing each side the due process of law.*

1972 Act Legis. Hist. at 682 (emphasis added).

Similarly, Senator Fannin observed that "[t]he district court judges have shown in recent years their capacity to resolve civil rights disputes . . . because of the respect with which the Federal judiciary is viewed, their decisions have greater immediate impact and moral sanctions than would the decision of an executive administrative agency."

1972 Act Legis. Hist. at 699.



In short, Congress' insistence upon the resolution of employment discrimination cases, as evidenced by the legislative history of Title VII, is beyond dispute. To be sure, there is no explicit reference to a preference for a judicial remedy over arbitration in the text of Title VII or ADEA. But that reflects a distinction without a difference. It is facile at best to suggest, as did the Fourth Circuit in *Gilmer*, that a choice of a judicial rather than administrative forum "says nothing about Congress' attitude toward arbitration." 895 F.2d at 199. Each of the reasons expressed by Congress in 1972 for preferring the courts over an EEOC remedy applies just as well to the arbitration alternative: The courts are public while administrative proceedings are private; the courts receive far greater public respect as a general rule than do arbitrators; the Federal Rules of Civil Procedure provide far greater discovery rights than are available in arbitration; and the courts have greater remedial powers, and experience in employing those powers in the employment discrimination field, than do arbitrators.

### CONCLUSION

The Fourth Circuit's decision in *Gilmer*, if allowed to stand by this Court, could well sound a death knell for the public, judicial enforcement of anti-employment discrimination laws in this country. If the Fourth Circuit's ruling is not reversed, employers can be expected to include as a matter of course in their employment contracts broad arbitration clauses and to insist upon the arbitration of all employment discrimination disputes. In that fashion, employers will escape the extensive discovery so often needed to prove a discrimination case, see *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the public scrutiny of a court trial and the power of the court system to fashion wide-ranging remedies in order to eliminate past and future discrimination.

This Court, we submit, should not countenance such a reversal in this country's commitment to equal employment opportunity. The availability of a judicial forum for the resolution of employment discrimination disputes is, and always has been, essential to the enforcement of ADEA, Title VII and all other civil rights statutes. The Fourth Circuit's decision in *Gilmer* should be reversed and the continuing viability of *Gardner-Denver* and its progeny affirmed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

ROBERT D. GILMER,

*Petitioner,*

—v.—

INTERSTATE/JOHNSON LANE CORPORATION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF OF SECURITIES INDUSTRY ASSOCIATION,  
INC. AS *AMICUS CURIAE*  
IN SUPPORT OF RESPONDENT**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

No. 90-18

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ROBERT D. GILMER,

*Petitioner,*

—v.—

INTERSTATE/JOHNSON LANE CORPORATION,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
 COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**BRIEF OF AMICUS CURIAE  
 SECURITIES INDUSTRY ASSOCIATION  
 IN SUPPORT OF THE RESPONDENT**

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**PRELIMINARY STATEMENT**

The Securities Industry Association, Inc. ("SIA") submits this brief as *amicus curiae* in support of the Respondent, and urges this Court to affirm the decision of the United States Court of Appeals for the Fourth Circuit in *Gilmer v. Interstate/Johnson Lane Corporation*, 895 F.2d 195 (4th Cir. 1990). Pursuant to Rule 37.3 of the Rules of this Court, the written consents of Petitioner Robert D. Gilmer and Respondent Interstate/Johnson Lane Corporation have been obtained and are being filed with the Clerk of the Court.

## INTEREST OF AMICUS CURIAE

SIA is the principal trade association of the securities industry. It has as members more than six hundred securities firms in the United States and Canada.

The rules and registration applications of the self-regulatory organizations in the securities industry, including the New York Stock Exchange, Inc. ("NYSE"), require arbitration of employment and termination disputes between securities firms and registered representatives. These disputes can involve claims arising under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* This Court's decision on whether arbitration of such claims can be compelled pursuant to written agreement and to self-regulatory organization rules will thus have a substantial impact upon SIA, its member firms and those associated with them.

SIA firmly believes that the Fourth Circuit was correct in its interpretation of prior decisions of this Court, of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "Arbitration Act"), and of the legislative history of the ADEA in directing enforcement of the arbitration agreement in this case.

## STATEMENT OF THE CASE

SIA defers to the statement of prior proceedings and of the facts underlying this dispute contained in the brief of the Respondent.

## SUMMARY OF ARGUMENT

Petitioner's arguments ignore the recent sea-change in judicial attitudes toward arbitration. In a series of decisions since 1985 (largely involving securities arbitration), this Court has put aside unfounded suspicion of the arbitral process and has unambiguously mandated enforcement of agreements to arbitrate disputes whenever possible.

The mere fact that a statutory right is in issue does not preclude the enforceability of an arbitration agreement. *See, Rodriguez De Quijas v. Shearson/American Express, Inc.*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 1917 (1989) (claims under Securities Act of 1933); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (claims under Racketeer Influenced and Corrupt Organizations Act, Securities Exchange Act of 1934); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust claims). Unless Petitioner can show a legislative intent to preclude arbitration of claims under the ADEA, his arguments must fail. *See, Mitsubishi*, 473 U.S. at 628. Petitioner has not met his burden. He has not, and cannot, point to any legislative history of the ADEA to support his position. Nor has he met his burden merely by pointing to Title VII cases that have declined to enforce arbitration agreements. Those cases are distinguishable from this one. (POINT I)

Petitioner similarly fails to establish that the policies underlying the ADEA are inconsistent with arbitration of claims under the ADEA. Petitioner's arguments in this regard amount to attacks on the efficacy and fairness of the arbitral process itself. Those arguments have been rejected by this and numerous other courts in recent decisions involving arbitration generally and securities arbitration in particular. As those decisions have found, the securities arbitration process, as currently constituted and as regulated by the Securities and Exchange Commission ("SEC"), is not only fair but offers significant benefits, including speedy access, relative informality and broader evidentiary scope, that can be of benefit to a claimant employee. (POINT II)

Finally, there is no merit in the arguments of various *amici curiae* in support of Petitioner, who question for the first time on this appeal the applicability of the Arbitration Act. Neither the statutory language nor the case law is on their side. While the asserted statutory exclusion refers to employment contracts, the arbitration provisions in this case are not contained in an employment contract. Moreover, this Court, among others, has applied the Arbitration Act to employees



of securities firms. *Perry v. Thomas*, 482 U.S. 483 (1987). (POINT III).

## ARGUMENT

### POINT I

#### CONGRESS DID NOT INTEND TO PRECLUDE BINDING ARBITRATION OF ADEA CLAIMS

During the last decade, this Court has repeatedly recognized a "federal policy favoring arbitration." *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983); see also, e.g., *McMahon*, 482 U.S. 220, 226 (1987). The Court has stated that the "federal substantive law of arbitrability" counsels

that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract itself or an allegation of waiver, delay, or a like defense to arbitrability.

*Mitsubishi*, 473 U.S. 614, 626 (quoting *Moses H. Cone Memorial Hospital*, 460 U.S. at 24-25).

In *Mitsubishi*, a case brought under the Sherman Act, 15 U.S.C. § 1 *et seq.*, the Court refused to infer from the Arbitration Act a presumption against the arbitration of statutory claims. At the same time it recognized that the Arbitration Act embodies a policy which "guarantee[s] the enforcement of private contractual arrangements." 473 U.S. at 625.

In *Perry*, 482 U.S. 483 (1987), the Court enforced the same arbitration provisions at issue in this case—those in the Uniform Application for Securities Industry Registration (Form U-4) (Joint Appendix ("JA") 15-18) and Rule 347 of the

NYSE—concluding that the Arbitration Act pre-empted state legislation that required resolution of the dispute in court.<sup>1</sup>

The trend favoring the enforcement of arbitration agreements culminated recently in *Rodriguez*, in which this Court overruled its decision in *Wilko v. Swan*, 346 U.S. 427 (1953), which had foreclosed arbitration of certain securities law claims, as reflecting "the outmoded presumption of disfavoring arbitration proceedings." *Rodriguez*, 109 S.Ct. at 1920.

In light of these decisions of the Court, Petitioner's argument that arbitration is inappropriate under the ADEA cannot rest solely on the fact that a statutory right is sought to be enforced. As this Court stated in *Rodriguez*, the Arbitration Act requires that "the party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute." 109 S.Ct. at 1921 (citing *McMahon*, 482 U.S. at 226-27). Petitioner has failed to meet this burden.

As was thoroughly addressed by the Court below, Congress has neither explicitly nor implicitly expressed a disapproval of arbitration of ADEA claims. 895 F.2d at 197-201. The ADEA is silent on the question of arbitration. So too is its legislative history. Had Congress intended to create a federal statutory right as to which arbitration would be inimical, it would have stated so when enacting the original legislation, or in subsequent amendments, particularly those of 1986 (Age Discrimination in Employment Amendments of 1986, Pub. L. 99-592 (October 31, 1986)), or 1990 (Older Workers

<sup>1</sup> Securities professionals are required to register with the self-regulatory organization(s) with which their firms do business. Application is accomplished by completing a Form U-4. 2 N.Y.S.E. Guide (CCH) ¶ 2345 (Rule 345).

Benefit Protection Act, Pub. L. 101-433 (October 17, 1990)).<sup>2</sup> Where Congress has not expressed such an intention, the courts have enforced pre-dispute arbitration of statutory rights involving, *inter alia*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, the Sherman Act, the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*<sup>3</sup>

<sup>2</sup> Recent proposed legislation has more commonly encouraged the use of arbitration—including binding arbitration. See e.g., Administrative Dispute Resolution Act (H.R. 2497 and S. 971), recently passed by both houses of Congress, which speaks at length of the benefits of alternative dispute resolution, and, in Section 585, expressly permits pre-dispute agreements to arbitrate. 136 Cong. Rec. H12967-71 (October 26, 1990). See also, proposed Ensuring Access through Medical Liability Reform Act (S. 2934), which provides for binding arbitration of medical malpractice claims. 136 Cong. Rec. S11101-086 (July 30, 1990).

<sup>3</sup> See, e.g., *Rodriguez* (Securities Act of 1933); *McMahon* (RICO, Securities Exchange Act of 1934); *Jeske v. Brooks*, 875 F.2d 71 (4th Cir. 1989), *cert. denied*, 111 S.Ct. 43 (1990) (Securities Act of 1933, Securities Exchange Act of 1934, RICO); *Nesslage v. York Securities, Inc.*, 823 F.2d 231 (8th Cir. 1987) (Securities Exchange Act of 1934, RICO); *Iacono, M.D., Inc. v. Drexel Burnham Lambert, Inc.*, 715 F. Supp. 18 (D.R.I. 1989) (enforced agreement to arbitrate a Securities Exchange Act of 1934 claim retroactively under an arbitration clause executed before this Court decided *McMahon*); *Sacks v. Dean Witter Reynolds*, 627 F. Supp. 377 (C.D. Cal. 1985) (Securities Exchange Act of 1934, RICO). Courts are now (since *Mitsubishi*) uniformly enforcing agreements to arbitrate antitrust claims, as well. See *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168, 173 (7th Cir. 1988); *Cindy's Candle Company, Inc. v. WNS, Inc.*, 714 F. Supp. 973, 979 (N.D. Ill. 1989); *Gremco Latinoamerica, Inc. v. Seiko Time Corp.*, 671 F. Supp. 972, 979 (S.D.N.Y. 1987). The courts are divided only with regard to ERISA. Compare *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988) (enforcing arbitration of ERISA claim) with *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 939 (3d Cir. 1985) and *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir.), *vacated and remanded*, 110 S. Ct. 225 (1989) (remanded for reconsideration in light of *Rodriguez* (finding compulsory arbitration incompatible with statutory scheme).

Petitioner argues that the ADEA is silent regarding arbitration only because *Wilko*, 346 U.S. 427 (1953), *overruled by Rodriguez*, was still in effect and precluded arbitration of statutory claims in 1967 when the ADEA was adopted. This argument is unpersuasive because *Wilko* was also in effect in 1970 when RICO was adopted. That did not preclude this Court from enforcing an arbitration agreement in *McMahon* that involved RICO claims.

Most courts that have addressed the issue have found ADEA claims to be arbitrable. In *Pierce v. Shearson Lehman Hutton, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1882, 1884 (April 26, 1990), the Court concluded that "the arbitrator has sufficient power to structure a remedy to eliminate age discrimination." Moreover, that Court noted that arbitration decisions are reviewable by the courts, and therefore any fear that courts will be removed from the enforcement of ADEA claims is unjustified. *Id.* at 1884.

In *Pihl v. Thomson McKinnon Securities, Inc.*, 48 Fair Empl. Prac. Cas. (BNA) 922 (May 24, 1988), the claimant had signed a Form U-4. As in *Pierce*, the Court could find no legislative intent "to exclude ADEA claims from the dictates of the Arbitration Act." *Id.* at 924.

The plaintiff in *Garfield v. Thomson McKinnon Securities, Inc.*, 731 F.Supp. 841 (N.D. Ill. 1988), had also signed a Form U-4. The Court in that action read the legislative history of the ADEA to favor "informal methods of dispute resolution" because the Act requires that claims be submitted to the EEOC initially, in an effort to resolve the dispute by conciliation, conference and persuasion. 731 F.Supp. at 843-44 (citing 29 U.S.C. § 626(d)).

SIA submits that the reasoning of the Court below and of other courts that have found ADEA claims arbitrable is compelling and more consistent with the recent arbitration decisions of this Court than the sole authority cited by Petitioner that denied arbitration of an ADEA claim. In *Nicholson v. CPC International*, 877 F.2d 221 (3d Cir. 1989), the Third Circuit relied on decisions of this Court that predated *Mitsu-*



*bishi* and involved other statutes, giving only lip service to the more recent decisions favoring arbitration. The dissenting judge concluded that the 1978 amendment to the ADEA, which added a tolling provision to the statute of limitations, was passed "to ensure that claimants achieved resolution of their claims despite delays and not, as the majority suggests, because informal mechanisms were perceived as inherently inferior to judicial resolution." 877 F.2d at 236 (Becker, J. dissenting).

The decisions of this Court relied on by the *Nicholson* court and the Petitioner are clearly distinguishable. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which pre-dated *Mitsubishi*, involved a collective bargaining agreement containing an arbitration provision. This Court refused to enforce the arbitration agreement because the individual claimant had no control over "the manner and extent to which [his] individual grievance [was] presented." *Id.* at 58, n.19. Moreover, the union might not have made the same strategic choices as would the claimant, perhaps because their interests differed or even conflicted. *Id.* Similarly *McDonald v. West Branch*, 466 U.S. 284 (1984), and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), involved collective bargaining agreements and pre-dated *Mitsubishi*<sup>4</sup>.

*Gardner-Denver* also expressed a mistrust for arbitral procedures notably absent from this Court's recent decisions. Compare 415 U.S. at 57 with *Rodriguez*, 109 S.Ct. at 1920 and *McMahon*, 482 U.S. at 232-34.

4 The decisions in *McDonald*, *Gardner-Denver*, and *Barrentine* suggested that Congress had not intended that arbitration be an exclusive procedural remedy under 42 U.S.C. § 1983, Title VII, or Fair Labor Standards Act, respectively. However, Congressional intent is not addressed in depth by the opinions of this Court or of the courts below. It was not until *Mitsubishi* that this Court clearly articulated the requirement that the opponent of arbitration bears the burden of demonstrating that Congress did not intend that the specific statutory right be arbitrated. 473 U.S. at 624-28.

In *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987), this Court was presented with two federal statutes—the Federal Employers' Liability Act ("FELA") and the Railway Labor Act ("RLA")—which appeared to be in conflict regarding the appropriate forum for resolution of certain employment disputes. The Court upheld the claimant's right to bring a FELA action for damages, concluding that the RLA is not intended to be exclusive. In *Buell*, once again, there was no individual contract requiring arbitration.

*Buell* is also not controlling here because the Arbitration Act, by its terms, is not applicable to "railroad employees." 9 U.S.C. § 1. Thus, the *Buell* decision required no deferral to the mandate of the Arbitration Act and, like the decisions in *McDonald*, *Gardner-Denver* and *Barrentine*, contains no discussion of the Act's policies. Here, where the policies of the Arbitration Act are fully involved, the *Mitsubishi* line of cases is far more applicable.

The Arbitration Act and its policies control the agreement to arbitrate in this action and require that it be enforced.

## POINT II

### ARBITRATION IS NOT IN CONFLICT WITH THE POLICIES UNDERLYING THE ADEA

Finding no comfort in the express legislative intent of Congress respecting the ADEA, Petitioner vaguely argues that arbitration is in conflict with the policies underlying the ADEA. Petitioner's arguments in this regard consist primarily of assertions that arbitration, and, in particular, NYSE arbitration, is an inadequate forum for the determination of important rights, in this case, ADEA claims. At least since *Mitsubishi*, however, this Court has rejected similar attacks by others in connection with what they viewed to be "important rights." The courts have left suspicion of arbitration behind and recognized the confidence that Congress has placed in the arbitration process through the Arbitration Act. In light of this current authority, Petitioner's complaints can



only be viewed as an attack on the wisdom of the Arbitration Act itself. This is neither the appropriate forum nor the time for such attacks.

**A. Petitioner's Criticisms of Arbitration Have Been Rejected by the Courts.**

In his Brief on the Merits, Petitioner expresses several unfounded suspicions in an effort to disparage arbitration generally. But this Court has repeatedly emphasized the benefits of arbitration, even when a statutory claim is involved.

By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

*Mitsubishi*, 473 U.S. at 628.

When the Arbitration Act was adopted, the House of Representatives recognized that it was a reaction to the "agitation against the costliness and delays of litigation." See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924)). In *McMahon*, this Court concluded that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." 482 U.S. at 232 (citing *Mitsubishi*, 473 U.S. at 628). It is also accepted that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims." *McMahon*, 482 U.S. at 232 (citing *Mitsubishi*, 473 U.S. at 633-34). Moreover, this Court has stated that while judicial scrutiny of arbitration awards is limited by necessity, "such review is sufficient to ensure that

arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S. at 232.<sup>5</sup>

Petitioner's specific attacks on NYSE arbitration similarly proceed as if the propriety of securities arbitration had never been addressed by the courts. Many of this Court's decisions upholding the enforceability of arbitration agreements, however, involved securities arbitration. See, e.g., *Rodriguez, McMahon, Perry, Byrd*. Indeed, the arbitration procedures of the NYSE have often been praised by the federal courts specifically in connection with employment disputes. See, *Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826, 829 (D.C. Cir. 1987) ("The arbitrators who serve on the Exchange Arbitration panels are experienced, competent individuals who are fully capable of examining, evaluating and deciding the types of claims being asserted by [the plaintiff].") (quoting affidavit of Edward Morris, Arbitration Director of the NYSE.); *Pierce*, 52 Fair Empl. Prac. Cas. (BNA) at 1884 (a case brought under the ADEA) ("The [NYSE] commercial arbitration procedures are substantially similar to those in a judicial forum and the arbitrator has sufficient power to structure a remedy to eliminate age discrimination"); *Pihl*, 48 Fair Empl. Prac. Cas. at 926 (a case brought under the ADEA) ("The NYSE's arbitration procedure . . . offers an efficient and just means for resolution of ADEA claims").

Thus, the Petitioner's suspicions regarding the arbitration procedures of the securities self-regulatory organizations have already been considered—and dismissed—by the courts.

**B. Petitioner's Criticisms of NYSE Arbitration are Factually Unfounded.**

The securities industry is one of the most heavily regulated in the world. Indeed, the courts' confidence in the arbitration procedures of the self-regulatory organizations rests in part on the knowledge that the SEC has oversight authority. In

<sup>5</sup> In their brief to this Court, the customers in *McMahon* raised the same criticisms as Petitioner. Brief for Respondent at 24-28. In deciding to enforce the arbitration agreement, this Court considered these criticisms and dismissed them.

*McMahon*, this Court noted that "[n]o proposed rule change may take effect unless the SEC finds the proposed rule is consistent with the requirements of the Exchange Act, 15 U.S.C. § 78s(b)(2) . . . and the Commission has the power to 'abrogate, add to, and delete from, any [self-regulatory organization] rule if it finds such changes necessary or appropriate to further the objectives of the Act, 15 U.S.C. § 78s(c)'" 482 U.S. at 233. SEC review is intended, *inter alia*, "to insure the fair administration of self-regulatory organization". 15 U.S.C. § 78s(c).

Among the rules of the self-regulatory organizations filed with the SEC are provisions for arbitration of intra-industry disputes. Such provisions have existed and been regularly utilized since the 19th century, and the NYSE has required arbitration of employment disputes between broker-dealers and their registered representatives since 1958. 2 N.Y.S.E. Guide (CCH) ¶ 2347 (Rule 347); Form U-4. For over thirty years, and many years before that on a voluntary basis, arbitration has been the accepted and effective means of resolving employment disputes in the industry.<sup>6</sup>

NYSE arbitration of disputes between broker-dealers and registered representatives is subject to substantially the same rules as disputes between customers and broker-dealers. As discussed above, those procedures have been found fair by this and many other courts.<sup>7</sup> In addition, they have been reviewed and approved by the SEC, which specifically noted their applicability to intra-industry disputes. SEC Order Approving Rule Changes to the Arbitration Process, Securi-

<sup>6</sup> See generally, Serota, *The Unjustified Furor Over Securities Arbitration*, 16 Pepperdine L. Rev. 5105 (May 1989); Goldman, Samuel P., *A Handbook of Stock Exchange Laws* (Matthew Bender & Company 1915), pp. 6, 127.

<sup>7</sup> Acceptance of Petitioner's argument would thus suggest that the same securities arbitration procedures are inadequate for registered employees of brokerage firms but adequate for customers. Such a finding would be without factual or legal support and would be inconsistent with the premises of the Court's recent customer arbitration decisions.

ties Exchange Act Release No. 34-26805 (CCH) (May 10, 1989).

Contrary to Petitioner's assertions, the panel designated to hear disputes like that involved in this litigation would currently consist of a majority of arbitrators from outside the securities industry.<sup>8</sup> Moreover, any industry arbitrator would be chosen from a panel that includes, among others, present and retired registered representatives and other non-managerial employees. 2 N.Y.S.E. Guide (CCH) ¶ 2607(a)(3) (Rule 607(a)(3)).

The remaining arbitration procedures are generally identical to those in customer arbitration, and are designed to assure impartiality and fairness.<sup>9</sup> Arbitrators are required to

<sup>8</sup> Panels composed entirely of industry members are utilized only where the controversy is "between parties who are members, allied members, member firms or member corporations." 2 N.Y.S.E. Guide (CCH) ¶ 2632 (Rule 632). Neither the record on appeal nor the membership lists in the current N.Y.S.E. Guide (CCH) (Volume 1) reflect that Petitioner falls in any of the categories requiring an all industry panel. Controversies involving "non-members" are heard by panels of three to five arbitrators appointed in the same manner as for customer claims. 2 N.Y.S.E. Guide (CCH) ¶¶ 2632 (Rule 632) and 2607 (Rule 607).

<sup>9</sup> Petitioner suggests that a significant difference is that the recently adopted NYSE Rule 637, requiring expanded disclosure respecting arbitration, is not applicable to Petitioner. Of course, this Court's recent decisions upholding securities customer arbitration were made even without such disclosure rule.

Moreover, Petitioner is being less than candid in his assertions that he was unaware of the significance of the arbitration provision in the Form U-4 and in the NYSE Rules. According to the Form U-4 (JA 15), petitioner became a registered representative in 1959. It is incomprehensible that after at least 22 years of employment in the securities industry he was ignorant of self-regulatory organization arbitration procedures at the time he completed the Form U-4.

Indeed, registered representatives are required to study industry rules (including arbitration provisions) and pass examinations respecting them before becoming registered. Securities Exchange Act of 1934



disclose any business affiliation with any parties before them, and may be disqualified for cause for even the appearance of a conflict of interest. See, e.g., 2 N.Y.S.E. Guide (CCH) ¶ 2610 (Rule 610). There are trial-type procedures, including the right to be represented by counsel, to cross-examine witnesses and to create a transcript. In addition, the increasingly broad discovery provisions allow parties to subpoena witnesses and documents and to compel the presence of an employee of a member firm, without resort to subpoenas. See, e.g., 2 N.Y.S.E. Guide (CCH) ¶¶ 2614-15, 2619-20, 2623 (Rules 614-15, 619-20, 623). These and other procedural safeguards are a result of joint efforts of the SEC and the industry itself, which has a long history of active self-regulation. See SEC Release No. 34-26805 (May 10, 1989).<sup>10</sup>

The actual experience with the operation of the NYSE arbitration rules has clearly demonstrated their fairness. The following statistics, which include both customer disputes and intra-industry disputes, were collected by the Securities Industry Conference on Arbitration ("SICA"), Report #6 (August 1989). They demonstrate that the overall arbitration process at the NYSE is efficient and frequently results in awards in favor of customers.

§ 15(b); NYSE Rule 345.13, 345.15(1) and (2). The U-4 itself, on the last page in item 2, contains a certification that the applicant has read, understands and agrees to abide by the rules of the relevant self-regulatory organizations.

Of course, in Item 5, any applicant, including Petitioner, specifically agrees "to arbitrate any dispute . . . that may arise between me and my firm."

<sup>10</sup> Petitioner's further argument that because arbitrations are non-public, the leverage of potential adverse publicity is lost, is particularly meritless. First, many awards are now public. Second, Petitioner cannot point to any express or implied legislative intent encouraging the use of publicity for leverage.

# NEW YORK STOCK EXCHANGE, INC.

Year	Total Cases		Small Claims		Public Customers Cases Decided	Awards in Favor of Public
	Total Cases Received	Concluded Including Settlement	Small Claims Received	Small Claims Concluded		
1980	367	327	131	110	221	119
1981	477	433	117	134	214	111
1982	558	473	109	113	214	118
1983	713	532	136	122	276	137
1984	1,008	796	176	183	259	113
1985	1,095	962	198	190	424	221
1986	965	1,004	181	205	432	210
1987	1,050	1,000	225	204	378	200
1988	1,623	1,196	263	235	440	228

While the results of NYSE arbitration of employment disputes between firms and registered representatives were, until 1989, not generally published, statistics are available for at least one prior period. They confirm that arbitration of employment claims is just as feasible, fair and efficient as is arbitration of customer disputes<sup>11</sup>:

Year	Total Cases Involving Registered Representatives	Cases Settled	Cases in which Registered Representative was Claimant		Cases in which Firm was Claimant	Cases in which Firm Received Award
			Registered Representative	Received an Award		
1986	341	183	79	58	79	59

Arbitration of employment disputes by another self-regulatory organization, the National Association of Securi-

<sup>11</sup> Masucci and Morris, "Arbitration at the National Association of Securities Dealers and the New York Stock Exchange," *Securities Arbitration 1989* (Practicing Law Institute).



ties Dealers, Inc. ("NASD"), reflects similar results for the associated persons (registered representatives)<sup>12</sup>:

Year	Total Cases with Assoc. Persons	Cases Settled or Withdrawn	Cases with Assoc. Person As Claimant	Cases in which Assoc. Person Received Award	Cases with Firm as Claimant	Cases in which Firm Received Award
1986	280	177	55	39	48	39

Since May, 1989, arbitration awards within the securities industry have been publicly available and have been published in the *Securities Arbitration Commentator Award Reporter*, a monthly periodical. The following table contains information from NYSE arbitrations between employees and firms, as tabulated from the publicly available information. This data includes arbitration results released by the NYSE from May, 1990 through October, 1990:

Cases with Employee as Claimant	No. of Awards in Employee's Favor	Total Amount of Awards	No. of Awards on Counter-Claims by Firm	Total Amount of Counter-Claims Awarded
65	47	\$6,445,900	3	\$41,000

Cases with Firm as Claimant	No. of Awards in Firm's Favor	Total Amount of Awards	No. of Awards on Counter-Claims by Employee	Total Amount of Counter-Claims Awarded
89	75	\$2,325,000	12	\$1,107,100

These statistics clearly reflect the fairness of the NYSE arbitration procedures. Employees received numerous and substantial awards on their claims and counterclaims.

<sup>12</sup> *Id.*

NASD employment arbitrations have had similar results, as the following data, also collected from publicly available information through October, 1990, reflects:

Cases with Employee as Claimant	No. of Awards in Employee's Favor	Total Amount of Awards	No. of Awards on Counter-Claims by Firm	Total Amount of Counter-Claims Awarded
21	15	\$760,400	2	\$77,200

Cases with Firm as Claimant	No. of Awards in Firm's Favor	Total Amount of Awards	No. of Awards on Counter-Claims by Employee	Total Amount of Counter-Claims Awarded
18	12	\$332,300	2	\$38,235,300 <sup>13</sup>

While the available data is recent, it reflects that employees have received substantial awards in arbitration proceedings, and have won a significant percentage of their cases.

Petitioner cannot merely suggest that arbitration of ADEA claims is inappropriate. He must point to something in the Act's legislative history that would corroborate his conclusion. He has not done so. Moreover, the relevant authorities and facts clearly establish the opposite conclusion—that NYSE arbitration is fully capable of fairly deciding ADEA claims.

<sup>13</sup> Includes one award on a counterclaim in favor of an employee in the amount of \$38,233,000. *Prescott Ball and Turben, Inc. v. Kanuth*, Case No. 88-1919, NASD, May 2, 1990.

## POINT III

**THE STATUTORY EXCLUSION CONTAINED IN THE  
ARBITRATION ACT DOES NOT APPLY  
TO THIS DISPUTE**

Respondent moved under the Arbitration Act to compel arbitration of Petitioner's claims. The *amici curiae* in support of Petitioner argue that the arbitration agreement in this litigation falls within the exclusion from the Arbitration Act for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

The argument of *amici* for Petitioner is without merit. As an initial matter, the exclusion from the Arbitration Act they rely on applies to arbitration provisions contained in "contracts of employment." In this case, the arbitration provisions are contained in NYSE Rule 347 and in Form U-4. Clearly, the Section 1 exemption does not apply to an arbitration agreement contained in a rule or registration application with a self-regulatory organization.

Moreover, courts have read the exclusory language in Section 1 of the Arbitration Act narrowly. They have almost universally held that in exempting "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce", Congress intended in Section 1 of the Arbitration Act to exclude only those workers "engaged in the movement of interstate or foreign commerce", i.e. the transportation industries. *Tenney Engineering v. United Electrical Radio & Machine Workers of America*, 207 F.2d 450, 452 (3d Cir. 1953); *Malison v. Prudential-Bache Securities, Inc.*, 654 F. Supp. 101, 104 (W.D.N.C. 1987) (refusing to apply the Section 1 exemption to a registered representative of a brokerage firm); *Miller Brewing v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) (employees of a brewery).

In cases involving registered representatives and other securities professionals, courts, including this Court, have regularly enforced, under the Arbitration Act, arbitration agreements in self-regulatory organization applications and rules.<sup>14</sup> *Perry*, 482 U.S. 483 (1987); *Coenen v. R.W. Presprich & Co.*, 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972); *Legg, Mason & Company, Inc. v. Mackall & Coe, Inc.*, 351 F. Supp. 1367, 1370 (D.D.C. 1972); *see also Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 704 (2d Cir. 1985), *cert. denied*, 475 U.S. 1067 (1986), *reh'g denied*, 475 U.S. 1151 (1986); *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047 (2d Cir. 1989) (enforcing the arbitration provisions in Form U-4 and NYSE Rule 347); *McGinnis v. E.F. Hutton and Company, Inc.*, 812 F.2d 1011 (6th Cir. 1987), *cert. denied*, 484 U.S. 824 (1987) (enforcing the arbitration provisions in Form U-4 and NYSE Rule 347); *Pearce; Haviland v. Goldman, Sachs & Co.*, 736 F.Supp. 507 (S.D.N.Y.1990); *Henderson v. Tucker, Anthony and RL Day*, 721 F.Supp. 24 (D.R.I. 1989); *Monahan v. Paine Webber Group, Inc.*, 724 F.Supp. 224 (S.D.N.Y. 1989). While the decisions often do not address the exclusionary language, this only suggests that the exclusion was so evidently inapplicable that neither the court nor the litigants raised the issue. Where the issue has been raised, the courts have declined to apply the Section 1 exclusion, concluding that registered representatives are not the types of "workers" envisioned by Congress. *Dickstein v. duPont*, 443 F.2d 783 (1st Cir. 1971); *see also Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 523 F.2d 433, 436 (6th Cir. 1975) (claimants "do not seriously contend that as 'account executives', they fall within the exception from coverage in § 1").

Thus, while this Court has not explicitly addressed this issue, it is well-settled in the lower courts that the Arbitration Act applies to arbitration agreements signed by registered

<sup>14</sup> Petitioner's suggestion in his brief that arbitration is inappropriate for the enforcement of personal—as opposed to economic—rights, therefore lacks support in the case law.

representatives of securities firms. The reasoning of the lower court decisions should be adopted here.

### CONCLUSION

Petitioner knowingly signed an agreement to arbitrate all of his disputes with his employer. He has failed to point to any express or implied congressional intent to preclude claims brought under the ADEA from mandatory arbitration. He should be held to his contract.

For the reasons stated above and in Respondent's Brief on the merits, *amicus curiae* the Securities Industry Association respectfully requests that this Court affirm the decision of the Fourth Circuit.

Respectfully submitted,

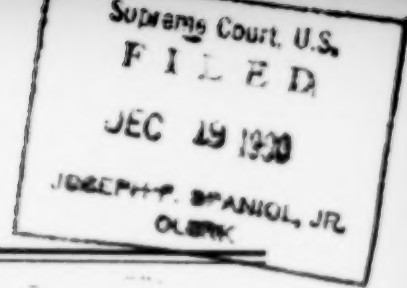
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10  
No. 90-18



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

ROBERT D. GILMER,

*Petitioner,*

v.

INTERSTATE/JOHNSON LANE CORPORATION,

*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF  
CENTER FOR PUBLIC RESOURCES, INC.  
IN SUPPORT OF RESPONDENT

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## STATEMENT OF INTEREST

The Center for Public Resources, Inc. (CPR) submits this brief as amicus curiae urging affirmance of the decision by the Court of Appeals for the Fourth Circuit.<sup>1</sup>

CPR is a non-profit corporation founded in 1979 and located at 366 Madison Avenue, New York, New York 10017. CPR's sole activity is the CPR Legal Program, a national coalition of 200 major corporations, generally represented by their chief legal officer; 100 law firms, represented by a senior partner; and legal scholars.

The CPR Legal Program is devoted to the field of alternative dispute resolution, or "ADR," as it is popularly called. Recognizing that courts, administrative agencies, and litigants alike are ill-served by costly, time-consuming, resource-wasteful<sup>2</sup> and divisive litigation, the mission of the CPR Legal Program is to develop, promote and implement alternatives to litigation. CPR committees of eminent practitioners have developed ADR approaches in a number of legal areas, including employment, hazardous waste, product liability, technology and toxic tort.

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<sup>1</sup> Written consent of the parties to the submission by CPR of this brief amicus curiae are on file with the Clerk of this Court.



Pertinent to the issue sub judice is the CPR's Model Employment Termination Dispute Resolution Procedure (Model Procedure), a project of the CPR Employment Disputes Committee, which is composed of leading lawyers from the management and plaintiffs bars as well as from academia and neutrals. The Model Procedure and the CPR's Model Agreement to Submit Termination Disputes to the Model Employment Termination Dispute Resolution Procedure (Model Agreement) are contained in Appendix A to this Brief.

The Model Procedure is incorporated into a model predispute agreement and sets out the rules by which any controversy over the termination of employment (or any other designated employment dispute) would be resolved in arbitration. An employee who signs the Model Agreement would be agreeing to have arbitration of these disputes governed by the Model Procedure. The Model Procedure could be used when hiring particular executives or could be made applicable generally to all employees or selectively to some, as a matter of corporate policy.

The Model Procedure is designed to relate only to employment terminations, though it may easily be adapted to

include other types of employment claims. Initially, the term "dispute" is defined broadly so it encompasses all manner of claims arising out of an employment termination. This is to place all such claims into arbitration, before a single "adjudicator",<sup>2</sup> and ensure their resolution efficaciously in a single proceeding.<sup>3</sup> Furthermore, by employee-employer agreement, resolution of any dispute pursuant to the Model Procedure, including disputes involving statutory, common law or contractual protections, is to be final and binding, or if not, to be accorded the fullest weight permitted by law.<sup>4</sup> As to discovery, the employee is expressly granted the right to depose one employer representative on the assumption that the employer has greater access to the reasons for termination.<sup>5</sup> The employee is also entitled to review his or her personnel record unless, upon a showing of good cause, the adjudicator excludes

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<sup>2</sup> Model Procedure, Article Eight at App. A-27-28.

<sup>3</sup> Model Procedure, Article One at App. A-21 and Commentary at App. A-42-44.

<sup>4</sup> Model Procedure, Article Two at App. A-22-23 and Commentary at App. A-44-48.

<sup>5</sup> Model Procedure, Article Ten at App. A-29 and Commentary on Article Ten at App. A-52-53.

certain confidential matters.<sup>6</sup> Other discovery is permissible but is confined to that which is relevant and for which each party has a "substantial, demonstrable need."<sup>7</sup> This limited discovery is aimed at ensuring a fair but cost-efficient proceeding and at curbing abuses encountered in certain court litigation.

The employee bears the burden of persuasion to demonstrate that the termination was not based on any legitimate business reason, considering the nature of the employee's position and responsibilities and the employer's stated policies.<sup>8</sup> Such a burden distinguishes the Model Procedure from an arbitration pursuant to a collective bargaining agreement's grievance procedure where an employer usually must prove "just cause." It instead places the burden on the employee in a manner roughly comparable to what it would be in civil rights litigation, and the commentary to the Model Procedure makes this eminently clear.<sup>9</sup> Hence, the adjudicator is expected to apply relevant statutory law, both

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<sup>6</sup> *Id.*

<sup>7</sup> Model Procedure, Article Ten at App. A-29.

<sup>8</sup> Model Procedure, Article Thirteen at App. A-30-31.

<sup>9</sup> Model Procedure, Commentary on Article Thirteen at App. A-53-55.

substantive and procedural. Indeed, under the Federal Arbitration Act (FAA), a court may vacate an award issued pursuant to the Model Procedure on the ground that an adjudicator who failed to apply prevailing law as required by the Model Procedure exceeded his authority.<sup>10</sup>

As far as the reasonable expenses of the adjudication are concerned, the employee is only required to pay the lesser of one-half of those costs or two days' gross compensation. These expenses (fully recoverable if the employee prevails) include the costs of the adjudicator and filing fees.<sup>11</sup> This makes the Model Procedure even more accessible to all employees.<sup>12</sup>

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<sup>10</sup> See Federal Arbitration Act, 9 U.S.C. § 10(d); see also Model Procedure, Article Twenty-One at App. A-37-38; cf. *Newsday, Inc. v. I.L. Typographical Union*, 915 F.2d 840 (2d Cir. 1990) (labor arbitration award vacated as being against public policy embodied in Title VII of the Civil Rights Act of 1964). In enforcing predispute agreements to arbitrate statutory claims, a judge may retain jurisdiction of the case for subsequent review of the arbitral award. See *Roe v. Kidder Peabody and Co., Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1865 (S.D.N.Y. 1990) (Haight, D.J.).

<sup>11</sup> Model Procedure, Article Sixteen at App. A-32-33.

<sup>12</sup> Model Procedure, Commentary on Article Sixteen at App. A-57-58.

Significantly, unlike most commercial arbitrations, the Model Procedure requires the adjudicator to render his or her decision in writing with express findings of fact on each issue of fact raised, the rationale for the decision and, if necessary, conclusions of law and discussion of legal authorities.<sup>13</sup> This requirement ensures that, even if the arbitral award is not final and binding as to its disposition of statutory claims, it would serve a therapeutic and deterrent function in not simply informing a party that it lost in whole or part, but in explaining in a reasoned manner the bases for the decision.<sup>14</sup> Moreover, a reasoned decision could serve persuasively in another proceeding, allowing a reviewing court to decide whether the arbitral award is dispositive of statutory claims.<sup>15</sup>

<sup>13</sup> Model Procedure, Article Seventeen at App. A-33-34.

<sup>14</sup> See M.M. Hoyman and L.E. Stallworth, "Arbitrating Discrimination Grievances in the Wake of Gardner-Denver," BLS Monthly Labor Review, at 3-10 (Oct. 1983), reporting on a study which found that, after Gardner-Denver, relitigation of arbitration decisions had not occurred in a majority of cases and, where it had occurred, the arbitrator was rarely contradicted.

<sup>15</sup> Model Procedure, Commentary on Article Seventeen at App. A-57-58.

The adjudicator has broad remedial powers and may award reinstatement, back pay and attorney's fees.<sup>16</sup> If reinstatement is warranted but not appropriate, up to two years' front pay may be awarded.<sup>17</sup> An employee has a duty to mitigate,<sup>18</sup> but the adjudicator may award liquidated damages.<sup>19</sup>

In sum, the protections of the Model Procedure bolster the conclusions of this Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985), that arbitration need not involve the loss of any substantive rights, but rather is purely a forum selection device.<sup>20</sup>

<sup>16</sup> Model Procedure, Articles Nineteen and Twenty at App. A-35-37.

<sup>17</sup> Model Procedure, Article Nineteen at App. A-35.

<sup>18</sup> Id. at App. A-36.

<sup>19</sup> Id.

<sup>20</sup> In many procedural respects, CPR's Model Procedure is similar to the American Arbitration Association's (AAA) "Commercial Arbitration Rules," and its "Model Employment Arbitration Procedures," one or the other of which have been incorporated by reference into certain executive employment agreements. In one key respect, for the purpose of selecting an arbitrator, the CPR model incorporates the AAA's "Commercial Arbitration Rules." Model Procedure, Article Eight at App. A-27.



### ISSUE PRESENTED

Whether claims brought pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq., are subject to compulsory arbitration.

### STATEMENT OF THE CASE

CPR adopts the Respondent's statement.

### SUMMARY OF ARGUMENT

With the courts remaining congested and backlogged, it is important to promote mutually beneficial alternative means of dispute resolution such as the arbitration of employment disputes. To promote arbitration as a term of employment is to offer employees a quick, inexpensive method of resolving individual disputes. In this regard, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), is not controlling. Gardner-Denver, a case involving the assertion of Title VII rights, arose in the context of arbitration under a collective bargaining agreement, and this strongly distinguishes it, since its holding was premised on the Court's concerns that, in the collective bargaining context, an employee's rights could be sacrificed for the union's

collective good, and that a labor arbitrator, bound only to interpret the parties' agreement, would not be obligated to apply applicable statutory law. Gardner-Denver was also based on the now-outdated view that arbitrators were less capable of resolving statutory disputes.

Recently, in cases involving individual agreements to arbitrate, such as that found here, this Court has consistently compelled the arbitration of claims arising under federal antitrust, securities and RICO laws. In fact, the presumption is in favor of arbitration, and the party opposing it bears the burden of showing that Congress intended to preclude its use as to a particular statute. And there is nothing in the ADEA or its legislative history which expresses any such Congressional intent.

The "Older Workers Benefit Protection Act" sets forth detailed requirements which must be met in order effectively to waive ADEA rights.<sup>21</sup> A predispute agreement to arbitrate may still be enforced, however, since an employee, by agreeing first to

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<sup>21</sup> "Older Workers Benefit Protection Act," Pub. L. 101-433, Title II, Section 201 (1990).

arbitrate a dispute, would not be relinquishing his right later to proceed in court.<sup>22</sup>

## ARGUMENT

### I.

#### **CLOGGED COURT DOCKETS AND SKYROCKETING LEGAL COSTS SIGNAL THAT AGREEMENTS TO ARBITRATE SHOULD BE ENFORCED.**

Two thousand, one hundred and sixty-six is the percentage increase from 1970 through 1989 in the number of

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<sup>22</sup> Although we agree with Respondent that not before this Court is the issue of whether the FAA § 1 exempts all employment contracts from its coverage, we wish to point out that long ago this issue was resolved in the seminal case of Tenney Engineering, Inc. v. United Electrical, Radio and Machine Workers, 207 F.2d 450 (3d Cir. 1953), and, although the Court did not mention this point in Perry v. Thomas, 482 U.S. 483 (1987), it there enforced, under the FAA, an agreement to arbitrate an employment dispute. Moreover, if this Court were to construe FAA § 1 to exclude all contracts of employment from its coverage, it would create an unfortunate void in that the only employment arbitration contracts which would be enforceable in federal court would be those in collective bargaining agreements and then only in a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. There is no basis for believing that such an anomalous result was intended by Congress.

employment discrimination cases filed in federal court, as reported by the Federal Courts Study Committee. By comparison, during that same period, all other federal civil litigation increased by only 125 percent.<sup>23</sup>

Although, in 1966, cases contesting hiring practices outnumbered employment termination cases by 50%, by 1985, termination cases reversed this ratio by more than six to one.<sup>24</sup> In 1986-1987, a total of 115,536 charges of unlawful discrimination were filed either with state and local human rights agencies or the Equal Employment Opportunity Commission (EEOC).<sup>25</sup> In that same period, over 10,000 cases of employment discrimination were

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<sup>23</sup> Daily Labor Report No. 5, at A-3 (Jan. 8, 1990) citing Federal Courts Study Committee Working Papers and Subcommittee Reports July 1, 1990 - Volume II at 49. (The Study Committee also pointed out that "in most nations, and in most areas of employment law in this nation, disputes are resolved by arbitrators" and recommended that employment discrimination claims be resolved in binding arbitration. Report of the Federal Courts Study Committee April 2, 1990, Part I, at 19).

<sup>24</sup> Federal Courts Study Committee Working Papers and Subcommittee Reports July 1, 1990 - Volume II at 50.

<sup>25</sup> U.S. Equal Employment Opportunity Commission, Office of Program Operations, Enforcement Statistics: FY 1980 - FY 1989 (1/90).

filed in federal and state courts, and 20,000 cases of unjust discharge were pending in state courts as well.<sup>26</sup>

In addition to the fact that the courts and administrative agencies are literally overrun with these claims, the costs to both sides in litigating them in a judicial forum are high. A Rand report has concluded that, during 1980-1986, defense fees in the wrongful discharge cases it studied averaged \$83,862 and were rising 15-24 percent annually.<sup>27</sup> Assuming a typical 40 percent contingency fee and based on an average plaintiff final payment of \$208,212, plaintiff attorney's fees come to \$83,285. The \$167,147 total of average legal fees is about 33 percent higher than the amount plaintiffs actually receive.<sup>28</sup> The Rand report demonstrated that, in the end, after expenditures for costs and fees, the median plaintiff received only \$30,000.<sup>29</sup> Significantly, the average case waited three years and two months from its filing to

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<sup>26</sup> A.F. Westin & A.G. Feliu, "Resolving Employment Disputes Without Litigation" at 1 (Bureau of National Affairs 1988).

<sup>27</sup> J. Dertouzos, E. Holland & P. Ebener, "The Legal and Economic Consequences of Wrongful Termination" at 40-45 (Rand Corp. 1988).

<sup>28</sup> *Id.* at 37, 40, 47.

<sup>29</sup> *Id.* at 39.

get to trial; moreover, those cases still pending at the time of the study's publication had already consumed, on average, another two years and four months in post-trial and appellate processes.<sup>30</sup>

Allowing an employer and employee to settle their disputes in a previously agreed upon arbitral forum would not only expedite their resolution and reduce a source of mounting pressures on our courts, but would reduce transactional costs to plaintiff and defendant alike. Indeed, if this Court refuses to allow enforcement of predispute arbitration agreements as to statutory employment claims, the Court would create an anomalous and inefficient situation whereby certain of an employee's claims against his employer would be heard in arbitration, while others, quite possibly involving the same facts, would be resolved some time later in court.

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<sup>30</sup> *Id.* at 24-25.



## II.

**GARDNER-DENVER DOES NOT PRECLUDE  
ENFORCEMENT OF AN INDIVIDUAL EMPLOYEE'S  
AGREEMENT TO ARBITRATE.**

The holding in Gardner-Denver that a union employee could have his Title VII claims heard de novo in court despite a prior arbitration award resolving them, was extended to alleged violations of the Fair Labor Standards Act in Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981), and to a claim under 42 U.S.C. §1983 in McDonald v. City of West Branch, 466 U.S. 284 (1984). These 1974-84 "First Decade" cases have stood as the major impediment to the enforcement in federal court of predispute arbitration agreements in employment contracts.

In more recent decisions, the 1985-to-present "Second Decade" cases, however, this Court, in embracing arbitration of key statutory rights, has all but expressly limited the reach of Gardner-Denver, a task which we respectfully request it to conclude in this case.

In Mitsubishi Motors Corp., 473 U.S. 614, 628 (1985), this Court compelled arbitration of antitrust claims and announced the controlling rule -- parties should be held to an agreement to arbitrate "unless Congress . . . has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Two years later, in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), this Court compelled arbitration of claims under the 1934 Securities and Exchange Act and SEC rule 10b-5 and under the Racketeer Influenced and Corrupt Organizations Act (RICO); and in Perry v. Thomas, 482 U.S. 483 (1987), held that the Federal Arbitration Act preempted a provision of California labor law which permitted wage collection actions to be heard in court regardless of a private agreement to arbitrate. Thereafter, in Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917 (1989), the Court extended its enforcement of arbitration agreements to a claim under the 1933 Securities Exchange Act. Finally, in its latest pronouncement, the Court, without opinion, vacated and remanded a decision of the Court of Appeals for the Second Circuit which had denied

enforcement to a predispute agreement to arbitrate a claim under the Employee Retirement Income Security Act.<sup>31</sup>

#### A. THE JUDICIAL CLIMATE HAS CHANGED.

First, Gardner-Denver, Barrentine and McDonald, all cases arising in the context of arbitration under collective bargaining agreements, did not mention, much less analyze, the Federal Arbitration Act. Though Gardner-Denver and its First-Decade progeny did not arise by virtue of a motion to compel arbitration and thus are procedurally distinguishable from the Second-Decade cases, Mitsubishi Motors Corp., McMahon, Perry and Rodriguez de Quijas, the First-Decade cases unnecessarily limited the effectiveness of private agreements to arbitrate and the policies underlying the FAA by allowing de novo judicial redeterminations of the same matters. In the context of the First-Decade cases, this Court was not concerned with enforcing what it has since repeatedly stated to be the "federal policy favoring

<sup>31</sup> Bird v. Shearson Lehman/American Express, Inc., 871 F.2d 292 (2d Cir.), vacated and remanded, 110 S. Ct. 225 (1989), remanded mem. op., No. 88-7704 (2d Cir. Jan. 19, 1990).

arbitration,"<sup>32</sup> which requires that the courts "rigorously enforce agreements to arbitrate."<sup>33</sup> In this Second Decade, the Court has consistently emphasized that the Federal Arbitration Act "is at bottom a policy guaranteeing the enforcement of private contractual arrangements,"<sup>34</sup> and that "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered."<sup>35</sup>

Second, the judicial hostility openly displayed in Gardner-Denver and its progeny towards arbitration as an inferior means of resolving statutory claims is no longer permissible. Arbitrators are no longer deemed incapable of resolving such disputes. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."<sup>36</sup> Indeed, in recently overruling

<sup>32</sup> McMahon, 482 U.S. 220, 226 (1987).

<sup>33</sup> Id. at 226 (1987).

<sup>34</sup> Mitsubishi Motors Corp., 473 U.S., 614, 625 (1985).

<sup>35</sup> Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

<sup>36</sup> Mitsubishi Motors Corp., 473 U.S. at 626-27 (1985).

Wilko v. Swan, 346 U.S. 427 (1953),<sup>37</sup> a decision cited favorably in Gardner-Denver,<sup>38</sup> this Court wiped away its initial and longest standing deprecation of arbitration.

Third, the Court now views an agreement to arbitrate as a forum selection device. Unlike the tack it took in Gardner-Denver, this Court no longer views an agreement to arbitrate as a relinquishment of substantive rights:

"[A] concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read. By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the

<sup>37</sup> Rodriguez de Quijas, 109 S. Ct. 1917, 1922 (1989).

<sup>38</sup> Gardner-Denver, 415 U.S. at 52 (1974).

simplicity, informality, and expedition of arbitration."<sup>39</sup>

Fourth, in Gardner-Denver, the Court took the view that claims relating to statutory rights must be resolved in the courts. Now, instead, the presumption is in favor of enforcing agreements to arbitrate these claims. In fact, the burden is on the party opposing arbitration to demonstrate that Congress expressed an intent to preclude waiver of the judicial forum.<sup>40</sup>

#### B. FACTUAL DISTINCTIONS BETWEEN COLLECTIVELY BARGAINED AND INDIVIDUAL ARBITRATION AGREEMENTS ARE CONTROLLING.

Gardner-Denver, Barrentine and McDonald all involved arbitration under collective bargaining agreements. In those cases, this Court was concerned that fundamental employee rights may not receive adequate protection since individual rights could be subordinated to the overall interests of the bargaining unit.<sup>41</sup> In the collective bargaining context, all the union owed was

<sup>39</sup> Mitsubishi Motors Corp., 473 U.S. at 628 (1985).

<sup>40</sup> McMahon, 482 U.S. 220, 227 (1987).

<sup>41</sup> Gardner-Denver, 415 U.S. 36, 58 n.19 (1974); Barrentine, 450 U.S. 728, 742 (1981); McDonald, 466 U.S. 284, 291 (1984).



a duty of fair representation,<sup>42</sup> not fairest representation. In the context of individually bargained agreements to arbitrate, the employee is not represented by a union and instead controls his own representation; thus, this problem of potentially competing interests is resolved.

In addition, under Gardner-Denver's rationale, the Court was concerned that an arbitrator acting under the authority of a collective bargaining agreement had the duty to interpret that contract only and was not able to apply general or statutory law to the contrary.<sup>43</sup> Yet again, where an individual employee's agreement to arbitrate, as in the instant case, does not restrict consideration of statutory law or, as in CPR's Model Procedure, affirmatively compels its consideration, the arbitrator is entirely free to apply relevant statutory law, thus fully protecting employee rights.<sup>44</sup>

<sup>42</sup> See Vaca v. Sipes, 386 U.S. 171 (1967).

<sup>43</sup> Gardner-Denver, 415 U.S. 36, 56-57 (1974); Barrentine, 450 U.S. 728, 744 (1981); McDonald, 466 U.S. 284, 290-291 (1984).

<sup>44</sup> See R. Coulson, "Employment Contracts: The Misunderstood Labor Cases," N.Y.L.J. at 3, col. 3 (Jan. 12, 1990), in which Mr. Coulson,  
(continued...)

### III.

#### PREDISPUTE ARBITRATION AGREEMENTS SHOULD BE ENFORCED AS TO ADEA DISPUTES.

##### A. THE FOURTH CIRCUIT'S REASONING IS CORRECT.

It is clear that, despite the many opportunities which Congress has had to express itself in enacting and amending the ADEA, no Congressional intent relating to arbitration may be discerned from either the text or legislative history of that statute.<sup>45</sup> Nevertheless, despite the strong federal policy favoring arbitration as expressed in the FAA, the Third Circuit disregarded this

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<sup>45</sup>(...continued)

President of the American Arbitration Association, explained that Gardner-Denver and progeny should be limited to the collective bargaining context.

<sup>45</sup> On this point, there is no dispute. Nicholson v. CPC International, Inc., 877 F.2d 221, 225 (3d Cir. 1989); Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 197 (4th Cir. 1990). The absence of Congressional intent is confirmed by an independent in-depth study of the ADEA's legislative history performed by CPR counsel's office. Congress's silence in the "Older Workers Benefit Protection Act," Pub. L. 101-433 (1990), in the face of the well-publicized arbitration issue in this case, however, is evidence that it has no aversion to the arbitration of ADEA claims.

mandate on the basis of shaky inferences.<sup>46</sup> Citing to the role of the EEOC in ADEA enforcement, it simply presumed that Congress did not want ADEA claims in arbitration because that could eliminate EEOC enforcement, since no charge of discrimination would be filed.<sup>47</sup> An individual, however, may settle his ADEA claim without EEOC involvement,<sup>48</sup> and there is

<sup>46</sup> *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3d Cir. 1989), affg 46 Fair Empl. Prac. Cas. (BNA) 1019 (D.N.J. 1988) (Sarokin, J.).

<sup>47</sup> The EEOC always retains the power to conduct investigations on its own initiative, 29 C.F.R. § 1626.4, and this holds regardless of any agreement an individual may sign. Likewise, the EEOC retains the independent authority to bring suit to remedy instances of alleged age discrimination. See 29 U.S.C. § 626(b); 29 C.F.R. §§ 1626.4, 1626.13; see also *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987) (employee who signed waiver of claims under ADEA could not waive right to file charge of discrimination with EEOC which retained power to seek injunction against company for unlawful conduct in violation of ADEA). This principle is reconfirmed in the "Older Workers Benefit Protection Act," Pub. L. 101-433, Title II, Section 201(f)(4) (1990) ("[n]o waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.").

<sup>48</sup> Indeed, under the "Older Workers Benefit Protection Act," Pub. L. 101-433, Title II (1990), an individual may validly waive a right or  
(continued...)

no reason why a private agreement to settle a matter using agreed upon procedures should be viewed as being deficient, so long as the individual employee is not precluded from filing a complaint of discrimination with the EEOC.

The very fact that the EEOC, an administrative agency, plays a role in the enforcement of the ADEA coupled with the grant of concurrent jurisdiction to both federal and state courts<sup>49</sup> demonstrates that Congress felt the resolution of ADEA claims need not be confined to any one place. The emphasis is on the vindication of ADEA rights, not on the forum to be used.<sup>50</sup> Indeed the ADEA itself directs the EEOC, in the first instance, to

<sup>49</sup>(...continued)

claim under the ADEA without any involvement by the EEOC. The EEOC itself, in its fiscal year 1989, only directly participated or intervened in 133 lawsuits under the ADEA, although it received to process 14,789 charges of age discrimination. U.S. Equal Employment Opportunity Commission, Office of General Counsel, Litigation Statistics FY 1980 - FY 1989 (1/90).

<sup>49</sup> 29 U.S.C. § 626(c).

<sup>50</sup> By analogy, this concept was reinforced in *Yellow Freight Sys., Inc. v. Donnelly*, 110 S. Ct. 1566 (1990), where this Court unanimously held that Title VII plaintiffs could proceed in either federal or state court, in the absence of any express statutory mandate precluding such.

seek to resolve disputes through informal methods of conciliation, conference and persuasion.<sup>51</sup>

In the appropriate case, not present here, the question of whether the predispute arbitration agreement was entered into by the plaintiff voluntarily and knowingly may have to be resolved before the agreement to arbitrate may be enforced. Whatever the level of sophistication or actual bargaining power of the employee, however, there must be no blanket presumption against enforcement, since arbitration would have been an openly and specifically stated and known condition of employment.<sup>52</sup>

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<sup>51</sup> 29 U.S.C. § 626(d)(2).

<sup>52</sup> See, e.g., Model Agreement at App. A-16-41. Also, market forces will ensure that employers adopt basically sound and fair systems, such as the Model Procedure, since employees can be expected to view such a procedure as an important term of employment and the more equitable a company's procedure, the more numerous and qualified its applicants and the more satisfied and productive its employees. See A.F. Westin & A.G. Feliu, "Resolving Employment Disputes Without Litigation" 49-58 (Bureau of National Affairs 1988).

## B. THE "OLDER WORKERS BENEFIT PROTECTION ACT" DOES NOT PRECLUDE ENFORCEMENT OF PREDISPUTE ARBITRATION AGREEMENTS.

On October 17, 1990, President Bush signed into law the "Older Workers Benefit Protection Act," Pub. L. 101-433, which amends the ADEA and, under Title II, Section 201, sets forth detailed requirements which must be met in order effectively to waive ADEA rights. Certainly, a predispute agreement to arbitrate akin to CPR's Model Agreement and Model Procedure is still enforceable since an employee, by agreeing first to arbitrate a dispute, would not be relinquishing his right later to proceed in court on the ADEA claim, with jury trial if desired.<sup>53</sup>

Notwithstanding this point, the resolution of the instant case is unaffected by the "Older Workers Benefit Protection Act" since Title II, Section 201 does not apply to waivers which occurred before that statute's date of enactment.<sup>54</sup> Accordingly, if

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<sup>53</sup> Model Procedure, Articles Two at App. A-23 and Twenty-Three at App. A-39, and their Commentary at App. A-44-48, App. A-62-63. There is no prospective "waiver" of the right to a jury trial under the ADEA where the employee defers that right.

<sup>54</sup> "Older Workers Benefit Protection Act," Pub. L. 101-433, Title II, Section 202(a) (1990).



Mr. Gilmer waived any rights, he did so validly insofar as the "Older Workers Benefit Protection Act" is concerned.

#### IV.

#### TO THE EXTENT GARDNER-DENVER STILL CONTROLS -- ITS FOOTNOTE 21 ALLOWS FOR THE ENFORCEMENT OF PREDISPUTE ARBITRATION AGREEMENTS.

In an often overlooked footnote, the Gardner-Denver Court expressed its views as to the weight to be given arbitration awards:

"We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of partic-

ular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum."<sup>55</sup>

Hence, even under that now outdated view of arbitration as an inferior dispute resolution mechanism, there was an opportunity to enforce arbitration awards rendered pursuant to predispute arbitration procedures which afforded the employee ample substantive and procedural protections. Under the CPR

<sup>55</sup> Gardner-Denver, 415 U.S. at 60 n.21 (1974).

Model Procedure, in particular, the prerequisites of Footnote 21 should be fully met and, at the very least, "great weight" may be given to the arbitrator's resolution of a statutory claim. The arbitrator must issue a written decision, and there are provisions for discovery and full opportunity to present evidence and argument at hearing. In addition, the burden of persuasion as to claimed violations of the anti-discrimination laws would be that utilized in court. Finally, the arbitrator possesses broad remedial powers to award reinstatement and virtually complete compensation in addition to punitive or liquidated damages and attorney's fees.

At a minimum, the possibility that, in a particular case, the arbitrator may improvidently disregard the individual's ADEA protections is not sufficient reason, in the first instance, to deny enforcement of an otherwise valid agreement to arbitrate. There is ample opportunity, if necessary, to correct any arbitral error in this regard, either in a proceeding to vacate an award under the FAA, 9 U.S.C. § 10(d), or in a proceeding under the ADEA in which the court will determine the weight to be accorded the arbitrator's decision and award.

## CONCLUSION

This Court has now repeatedly endorsed it, the Federal Arbitration Act commands it, practicality compels it, and the two parties agreed to it. Accordingly, there is every reason to enforce a predispute agreement to arbitrate statutory claims, including a claim under the ADEA. For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

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**APPENDIX A**

**MODEL ADR PROCEDURES**

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**EMPLOYMENT TERMINATION  
DISPUTE RESOLUTION AGREEMENT AND PROCEDURE**



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## INTRODUCTION

In 1987, the CPR Employment Disputes Committee prepared two model procedures for the resolution of employment disputes. Both procedures -- the "CPR Model Procedure for Mediation of Termination and Other Disputes" and the "CPR Model Procedure for Employment Termination Dispute Adjudication" -- were intended for application, by agreement between the parties, *after* the dispute had arisen. Following publication of these post-dispute procedures, the Committee tackled the more sensitive and challenging task of constructing a comprehensive procedure which could be implemented on a *pre-dispute* basis to resolve employment claims, whether based on contractual, common law or statutory principles. Its objective was to construct a fair, private, expeditious, economical and final procedure, less burdensome or adversarial than litigation, which any private employer could implement, at the inception of employment or upon sufficient advance notice to employees, through use of a standardized pre-dispute arbitration agreement.

The Committee delegated initial study and drafting to a subcommittee of Jay W. Waks (chairman), Alfred G. Feliu, Bruce McLanahan and Wayne N. Outten. The subcommittee focused initially on disputes in regard to employment termination, and its work culminated in the Committee's approval of two models, the texts of which are contained later in this report:

(1) the **Model Agreement to Submit Termination Disputes to the Model Employment Termination Dispute Resolution Procedure** (the "Model Agreement"); and

(2) the **Model Employment Termination Dispute Resolution Procedure** (the "Model Procedure").

The Committee, which includes a broad spectrum of lawyers and arbitrators in the field of employment disputes, believes that the Model Agreement and Model Procedure can serve, sometimes with appropriate modifications, the interests of employers, employees and the public in many cases. In addition, the Committee has consulted with other lawyers who represent various parties in these disputes, and most have concurred that the procedure would often be appropriate for their clients.

The Model Agreement and Model Procedure are predicated on having an executive or other employee, when hired or with ample advance notice, agree to arbitrate any dispute which might arise out of the termination of that relationship (including to prospectively waive recourse to an administrative or judicial forum). On this premise, claims of improper termination, breach of employment contract or employment discrimination, and other claims ancillary to them, could be resolved quickly, fairly, fully and finally in arbitration.

In making available the Model Agreement and Model Procedure, the Committee is mindful that, although certain court decisions beginning with *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) <sup>1</sup>, appear to have been undermined, they remain on the books and, accordingly, an employer cannot count on having pre-dispute arbitration agreements enforced in all circumstances

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<sup>1</sup> In *Alexander v. Gardner-Denver*, the Court held that an employee, whose claim of employment discrimination is subject to compulsory arbitration under a collective bargaining agreement, is not precluded from suing in court under Title VII of the Civil Rights Act of 1964. In its footnote 21, the Court explained, however, that the arbitrator's decision, although not final, may be entitled to appropriate weight (415 U.S. at 60 n.21).



(see the Model Procedure's commentary to Article Two). The arbitrability under a pre-dispute agreement of a claim of age discrimination is scheduled for argument in early 1991 before the United States Supreme Court. *Gilmer v. Interstate/Johnson Lane Corp.*, cert. granted 59 U.S.L.W. 3212 (Oct. 1, 1990). The Committee believes that, ultimately, this type of agreement and procedure is likely to be held to be enforceable under the Federal Arbitration Act and, in any event, should dispose of most cases as a practical matter.

#### SUMMARY<sup>2</sup>

The Model Procedure is predicated on the Model Agreement and sets out the rules by which any controversy over the termination of employment, including discrimination issues, would be resolved in arbitration. An employee who signs the Model Agreement would be agreeing to have arbitration of these disputes governed by the Model Procedure. They could be used

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<sup>2</sup> This summary is adapted from the article by J. W. Waks and L. Ginsberg, "Arbitrating Executive and Other Employment Disputes: Let's Put A Pin In Gardner-Denver!" to be published in *Proceedings of New York University's 43rd National Conference on Labor* (Little, Brown 1990).

when hiring particular executives or made applicable generally to all employees or selectively to some, as a matter of corporate policy. The Model Procedure itself provides that an employer may cancel the Model Agreement and Model Procedure on 180 days' written notice to the signatory employee.

The Model Procedure is designed to relate only to employment terminations, though it may easily be adapted to include other types of employment claims. Initially, the term "dispute" is defined broadly so it encompasses all manner of claims arising out of an employment termination. This is to force them into arbitration at the same time and ensure their resolution in a single proceeding.

In addition, all claims which can be brought under the Model Procedure must be so brought first, even if recourse to a judicial or administrative forum is preserved by law. Thus, the doctrine of exhaustion of remedies is of key importance to the Model Procedure.

Furthermore, by employee-employer agreement, resolution of any dispute pursuant to the Model Procedure is to be final and binding, or if not, to be accorded the fullest weight

permitted by law. This should result in the efficient, cost-effective resolution of employment termination disputes, be they based on statutory, common law or contractual protections.

All claims involving a particular termination are heard by a single "adjudicator", who will be selected by agreement between the parties, if possible. Otherwise, the adjudicator will be an attorney with experience in employment disputes selected from the American Arbitration Association commercial arbitration panel pursuant to the AAA Commercial Arbitration Rules.

An employee must commence the Model Procedure within 180 days after written notice of the termination, unless a dispute over a deferred or later awarded bonus is involved, in which case the period runs from the time the terminated employee receives or is notified of a denial of compensation. This provision is intended to achieve an expeditious resolution of claims.

Limited discovery involving the exchange of documents is permitted though it is confined to that which is relevant and for which each party has a "substantial, demonstrable need". The employee is expressly granted the right to depose one employer representative on the assumption that the employer has

greater access to the reasons for termination. The employee is also entitled to review his or her personnel record unless, upon a showing of good cause, the adjudicator excludes certain confidential matters. Although some management counsel may bridle at the thought of even this limited discovery permitted a discharged employee, it serves the important purpose of ensuring the procedure's acceptability by employees and by the courts, especially in cases challenging the fairness of the procedure in adjudicating statutory claims.

The employee bears the burden of persuasion to demonstrate that the termination was not based on any legitimate business reason, considering the nature of the employee's position and responsibilities and the employer's stated policies. Such a burden distinguishes the Model Procedure from an arbitration pursuant to a collective bargaining agreement's grievance procedure where an employer usually must prove "just cause". It instead places the burden on the employee in a manner roughly comparable to what it would be in civil rights or other employment litigation, and the commentary to the Model Procedure makes this clear. Hence, the adjudicator is expected to apply relevant statutory law,

both substantive and procedural, and if, for instance, the Civil Rights Act of 1990 were passed, the adjudicator would have to apply that law as well. Indeed, under the Federal Arbitration Act, on a motion to vacate an award issued pursuant to the Model Procedure, a party would be able to argue that an adjudicator, who failed to apply prevailing law as required by the Model Procedure, exceeded his authority.

Under another provision, all aspects of the proceeding are confidential, thus avoiding the inevitable publicity attendant to litigation which could adversely affect the terminated employee or the employer, or otherwise possibly impact the workforce.

As far as the expenses of the adjudication are concerned, the employee is required only to pay the lesser of one-half of these costs or two days' gross compensation. These include the costs of the adjudicator and filing fees (but not attorneys' fees unless the adjudicator awards them). This would make the Model Procedure more accessible to employees than would litigation.

Significantly, unlike most commercial and specialized industry arbitrations, the Model Procedure requires the

adjudicator to render a decision in writing with express findings of fact on each issue of fact raised, the rationale for the decision and, if necessary, conclusions of law and discussion of legal authorities. This requirement reflects the reality that statutory claims are often pleaded in all manner of employment litigation. Accordingly, it ensures that the decision can be reviewed in any subsequent proceeding. It would allow a reviewing court, confronted with the issue of whether the arbitral award is dispositive of statutory claims, to ensure that the adjudicator decided the matter at hand. Moreover, even if the arbitral award is not ultimately deemed final and binding as to its disposition of statutory claims, a reasoned decision could serve persuasively in another proceeding.

Of equal or perhaps greater importance, the requirement of a reasoned decision may also serve a therapeutic and deterrent function in that it guarantees the proverbial "day in court" and an explanation of exactly why the party lost in whole or part, hopefully discouraging any possible relitigation.<sup>3</sup>

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<sup>3</sup> Indeed, one study found that, even after *Gardner-Denver*, relitigation of arbitration decisions had not occurred in a majority of cases and, where it had occurred, the arbitrator was rarely contradicted. M.M. Hoyman (continued...)



The adjudicator has broad remedial powers and may award reinstatement, back pay and attorneys' fees. If reinstatement is warranted but not appropriate, up to two years' front pay may be awarded. An employee has a duty to mitigate and any award of back pay will be reduced by interim compensation and benefits, including unemployment, disability, severance and retirement benefits. In addition, the adjudicator may award up to one year in liquidated damages where appropriate. These broad powers should allay any lingering doubts that an employee's substantive rights can be protected adequately in arbitration.

A proceeding under the Model Procedure is considered to be an arbitration subject to the Federal Arbitration Act, and an award may be vacated or modified only on grounds specified in the applicable law. This assures limited judicial review of adjudications under the Model Procedure, thus promoting the finality of awards.

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<sup>3</sup>(...continued)

& L.E. Stallworth, "Arbitrating Discrimination Grievances in the Wake of *Gardner-Denver*," BLS Monthly Labor Review at 3-10 (Oct. 1983).

In short, the Model Agreement is basically a forum selection device, and the Model Procedure ensures a fair proceeding equivalent to that provided for in a court of law, while eliminating the needless waste and delay of litigation.

*Center for Public Resources*

**MODEL AGREEMENT TO SUBMIT TERMINATION**

**DISPUTES TO THE MODEL EMPLOYMENT**

**TERMINATION DISPUTE RESOLUTION PROCEDURE**

**Statement of Principles**

Termination of an employment relationship may give rise to disputes between the Employee and the Employer. It is in their mutual interest to resolve any such disputes through a procedure that is

fair,

private,

expeditious,

economical,

final and

less burdensome or adversarial than

litigation.

The Model Employment Termination Dispute Resolution Procedure (the "Model Procedure") of the Center for Public Resources was developed by a committee of leading

attorneys representing both employees and employers to achieve the above objectives.

In order for the Employee to prevail under the Model Procedure (paragraph 13-1), the Adjudicator must find that termination of employment was not based on legitimate business reasons, taking into account (a) the nature of the Employee's position and responsibilities and (b) the Employer's stated policies. (This standard generally is more favorable to the Employee than the law of most states and less favorable than the law of a small number of states.)

\_\_\_\_\_ (the "Employer") has adopted and agrees to follow the Model Procedure in the event of a dispute with a terminated Employee and expects its Employees to similarly agree by signing this document (the "Model Agreement").

**The Model Agreement and the Model Procedure affect significant legal rights. The Employee is advised to consult legal counsel before signing the Model Agreement.**

## **The Model Agreement**

I agree that all Disputes, as that term is defined in Article One of the Model Procedure, will be determined under the Model Procedure.

On \_\_\_\_\_, I received a copy of this Model Agreement and the Model Procedure. I understand that I am entitled to receive a copy of the signed Model Agreement.

I have had at least 72 hours (excluding weekends and holidays) before signing this Agreement to read the Model Agreement and Model Procedure and to consult legal counsel about them.

I have read and understand the Model Agreement and Model Procedure.

I understand and agree that:

1. It is a material condition of my employment that I agree to the Model Agreement and Model Procedure.
2. I will first raise pursuant to the Model Procedure any claim against the Employer I may have regarding the termination of my employment (including any claim of

constructive termination), even if I may also file a legal action based on that claim in another forum.

3. I must file my claim under the Model Procedure within 180 days of my being notified by the Employer of its decision to terminate my employment.
4. Any award rendered by the Adjudicator is final and binding upon both me and the Employer.
5. The Employer may cancel the Model Procedure at any time on 180 days' written notice to me.
6. Should this Model Agreement or the Model Procedure be held unenforceable in whole or in part or be cancelled, my employment will be "at-will" to the extent permitted by applicable law. (The term "at-will" employment means that either the Employee or the Employer may terminate the



employment at any time, without notice, and for any or no reason. Certain federal and state laws, however, limit the reasons for which the Employer may terminate "at-will" employees.)

7. The provisions of the Model Procedure, and not any summary thereof, shall control.

**AGREED:**

\_\_\_\_\_  
(Type or print name of Applicant  
or Employee)

Date: \_\_\_\_\_

The Company agrees to adhere to the Model Agreement and the Model Procedure in connection with the employment of the Employee whose signature appears above.

(NAME OF COMPANY)

BY: \_\_\_\_\_

Date: \_\_\_\_\_

*Center For Public Resources*

**MODEL EMPLOYMENT TERMINATION  
DISPUTE RESOLUTION PROCEDURE**

Pursuant to the Model Agreement, the Employee and the Employer (collectively, the "Parties") agree to submit for resolution as provided for in this Model Employment Termination Dispute Resolution Procedure (the "Model Procedure"), any employment termination Dispute (as this term is defined below).

**ARTICLES**

**ONE: Disputes (and Parties) Subject to Model Procedure**

1-1. The term "Dispute", whether in the singular or plural, means (a) all claims, disputes or issues of which the Employee is or should be aware and which are directly related to or arise out of the termination of the employment of the Employee by the Employer (including any claim of constructive termination), and (b) all Employer counterclaims against that Employee of which the Employer is or should have been aware prior to the termination.

1-2. The term "Employer" means the employer of the Employee and its parent company, subsidiaries and affiliates and their respective directors, officers, employees and agents.

1-3. All Disputes are subject to this Model Procedure.

**TWO: Exclusivity, Exhaustion, Waiver and Binding Effect**

2-1. All Disputes shall be presented for resolution pursuant to this Model Procedure.

2-2. Resolution of any Dispute pursuant to the Model Procedure is intended to be final and binding on the Parties to the extent permitted by law.

2-3. Even if not found to be final and binding, the Award of the Adjudicator shall be accorded the fullest weight permitted by law.

2-4. The failure of an Employee to initiate the Model Procedure within the time limits set forth in Article Four shall be deemed a waiver and release by that Employee of the Employer with respect to any Disputes relative to that Employee, unless the right to pursue a statutory claim or remedy is preserved by law.

2-5. Once an Employee initiates the Model Procedure to adjudicate a Dispute, the failure of the Employer to state a counterclaim of which the Employer is or should have been aware prior to an Employee's termination, within the time limit of paragraph 6-3, shall be deemed a waiver and release by the Employer of that Employee with respect to that counterclaim, unless the right to pursue a statutory claim or remedy is preserved by law.

2-6. The Parties shall be precluded from bringing or raising in court or before another forum any Dispute which could have been brought or raised pursuant to this Model Procedure, unless the right to pursue a statutory claim or remedy is expressly preserved by law.

2-7. Prior to receiving an Award of the Adjudicator, neither Party shall seek to enjoin any proceeding pursuant to the Model Procedure on the basis that the Award would not be enforceable.

**THREE: Distribution of Model Procedure**

3-1. The Employer will give a copy of the executed Model Agreement and the Model Procedure to the Employee (a) at the commencement of employment or at the time

of the adoption of the Model Procedure, and (b) within 5 days after the Employee is given written notice of the decision to terminate employment.

#### **FOUR: Time Limit To Initiate Model Procedure**

4-1. An Employee must initiate the Model Procedure pursuant to Article Six within 180 days after the Employee is given written notice of the decision to terminate his or her employment, except that an Employee must initiate the Model Procedure with respect to any Dispute over deferred or later awarded or calculated compensation or bonus within 180 days after the Employee receives it or is notified in writing that it is denied.

4-2. If the Employer fails to comply with paragraph 3-1(b) as to the Employee, that Employee's time limit to initiate the Model Procedure shall be extended from 180 days to 1 year.

#### **FIVE: Representation**

5-1. The Parties may be represented by counsel or by any individual of their choice.

#### **SIX: Initiation of Model Procedure and Time Limit for Counterclaims**

6-1. To initiate the Model Procedure to adjudicate a Dispute, the Employee shall give written notice to the \_\_\_\_\_ Department of the Employer and to any person who is alleged to have committed the act or made the omission which is the basis of the Dispute.

6-2. The notice shall state the nature of the Employee's claim and the address which the Employee will use for the purpose of the Model Procedure.

6-3. Within 20 days after the Employee's notice is given, the Employer shall give the Employee a statement of the reasons for termination and any pre-termination counterclaims then known to the Employer.

6-4. Within 20 days after the Employer's counterclaims are given, the Employee shall give the Employer a statement of the Employee's defenses thereto.

#### **SEVEN: Timing and Method of Giving Notice**

7-1. Any notice, commencing with notice given pursuant to Article Six, shall be deemed given for the purposes of



the Model Procedure upon delivery by hand or, if mailed, by depositing the notice in a postage-paid envelope, return receipt requested, in a U.S. Postal Service deposit box regularly maintained for this purpose.

7-2. Delivery by hand shall be to a person of suitable age and discretion at the office or address specified in paragraph 7-3. Delivery by hand shall include delivery by a non-U.S. Postal Service package delivery service which provides a return receipt as proof of delivery.

7-3. The Employer shall use the address last listed by the Employee with the Employer for income tax withholding in order to give the Employee the materials according to Article Three. For all other purposes, the Employee's address pursuant to Article Six shall be used.

7-4. The production of an affidavit of service, signed and dated acknowledgement of receipt or a signed and dated return receipt shall be adequate proof to presume delivery.

## **EIGHT: The Adjudicator**

8-1. Any Dispute will be decided by a single decisionmaker, called the "Adjudicator".

8-2. The Parties will attempt to agree on the selection of the Adjudicator. If the Parties cannot promptly so agree, the Adjudicator will be chosen pursuant to Rule 13 of the Commercial Arbitration Rules of the American Arbitration Association ("AAA") and shall be an attorney who is a member of the AAA commercial arbitration panel with experience in employment disputes. Either party may request the AAA's assistance through its regional office responsible for the venue specified in paragraph 9-1. The functions of the AAA shall be limited to assistance in selection of the Adjudicator in accordance with this paragraph, and the AAA's Commercial Arbitration Rules shall not otherwise apply. At the request of the Employee, the AAA's filing fee, normally payable at the time a case is filed, shall be advanced by the Employer, subject to apportionment pursuant to Articles Sixteen and Nineteen.

8-3. Unless the parties agree otherwise, all Disputes related to the Employee shall be submitted in the same

proceeding to the Adjudicator selected pursuant to this Article Eight.

8-4. The Adjudicator shall not be liable to either Party for any act or omission in connection with the proceeding. Neither Party shall sue, join, subpoena or in any manner otherwise involve in any action or proceeding the Adjudicator, unless the right to so involve the Adjudicator is expressly preserved by statute.

#### **NINE: Venue and Place of Hearing**

9-1. The venue of any Dispute shall be the county in which the Employee performed the principal duties of his or her job.

9-2. Unless the Parties otherwise agree or the Adjudicator otherwise directs for good reason, any hearing shall be conducted and the adjudication shall be deemed held in that county of venue.

#### **TEN: Discovery**

10-1. The Parties shall cooperate in the voluntary exchange of such documents and information as will serve to expedite the adjudication.

10-2. Discovery shall be conducted in the most expeditious and cost-effective manner possible, and shall be limited to that which is relevant and for which each Party has a substantial, demonstrable need.

10-3. Upon request, either Party shall be entitled to receive, prior to the hearing, copies of documents subject to discovery. Upon request, the Employee shall also be entitled to a true copy of his or her personnel records kept in the ordinary course of business and pursuant to Employer policy, other than records relating to pre-employment procedures, subject to any condition or limitation imposed by the Adjudicator upon a showing of good cause.

10-4. Upon request, the Employee shall be entitled to take at least one deposition of an Employer representative designated by the Employee.

10-5. Any disputes relative to discovery shall be presented to the Adjudicator for final and binding resolution.

10-6. The Adjudicator may grant, upon good cause shown, either Party's request for discovery in addition to or limiting that for which this Article Ten expressly provides.

#### **ELEVEN: Subpoenas**

11-1. Counsel may issue subpoenas of witnesses or documents to the extent permitted in a judicial proceeding.

11-2. The Adjudicator is empowered to subpoena witnesses or documents to the extent permitted in a judicial proceeding, upon his or her own initiative or the request of a Party.

11-3. Unless the Adjudicator directs otherwise pursuant to Articles Nineteen or Twenty, the Party requesting the production of any witness or proof shall bear the costs of such production.

#### **TWELVE: Order of Presentation**

12-1. At the hearing, the Employer shall first present its evidence as to the Dispute over termination.

12-2. The order of presentation as to any other issue shall be determined by the Adjudicator.

#### **THIRTEEN: Standard and Burden of Persuasion**

13-1. In order for the Employee to prevail on any Dispute over termination, the Employee shall demonstrate that the termination was not based on any legitimate business reason, taking

into account (a) the nature of the Employee's position and responsibilities, and (b) the Employer's stated policies.

13-2. Each Party bears the burden of persuasion on any claim or counterclaim raised by that Party under the Model Procedure.

#### **FOURTEEN: Evidence and Argument**

14-1. The Adjudicator shall afford each Party a full and fair opportunity to present any relevant proof, to call and cross-examine witnesses and to present its argument.

14-2. The Adjudicator shall not be bound by any formal rules of evidence with the exception of applicable law with respect to attorney-client privilege and work product.

14-3. The Adjudicator shall decide the relevancy of the evidence offered, and the Adjudicator's decision on any question of evidence or argument shall be final and binding.

#### **FIFTEEN: Confidentiality**

15-1. All aspects of the adjudication pursuant to the Model Procedure, including the hearing and record of the proceeding, are confidential and shall not be open to the public, except (a) to the extent both Parties agree otherwise in writing, (b) as may



be appropriate in any subsequent proceedings between the Parties, or (c) as may otherwise be appropriate in response to a governmental agency or legal process.

15-2. The Employee or counsel for the Employee shall be entitled to review copies of relevant Awards rendered within 1 year preceding initiation of the Model Procedure, from which copies the Employer shall redact names and sensitive or confidential information. The Employee and counsel shall hold in confidence information regarding a prior adjudication and Award.

#### **SIXTEEN: Expenses**

16-1. The Employee shall bear the reasonable expenses of the adjudication up to the lesser of (a) one-half these expenses or (b) 2 days' gross cash compensation (including bonuses, commissions and related cash compensation) of the Employee during the 12 months immediately preceding the notice of claim. The Employer shall bear the remainder of these expenses.

16-3. The "expenses of the adjudication", to which this Article Sixteen refers, shall mean the expenses of the Adjudicator (such as daily fee and travel), filing fee, and the cost of producing at the direction of the Adjudicator any witnesses or

proof, and shall exclude the Parties' respective attorneys' fees and disbursements, expenses of witnesses and costs of producing other evidence.

#### **SEVENTEEN: The Award**

17-1. The Adjudicator shall render his or her decision and award (collectively the "Award") based solely on the evidence and authorities presented, the policies and practices of the Employer, the applicable law argued by the Parties, and the provisions of the Model Procedure as interpreted by the Adjudicator.

17-2. The Award shall be in writing and signed and dated by the Adjudicator and shall contain express findings of fact (including findings on each issue of fact raised by a Party), the rationale for the Award and, if necessary to dispose of any issues of law, conclusions of law and discussions of legal authorities. The Adjudicator shall give signed duplicate original copies of the Award to both Parties.

17-3. The Award may be entered as a judgment in any court of competent jurisdiction.

17-4. Unless applicable law provides otherwise, the Award shall be final and binding and not subject to review or appeal.

**EIGHTEEN: Record of Proceeding**

18-1. A record of the hearing shall be made, at the election and expense of the Employer, by audio or video taping or by verbatim transcription.

18-2. The Adjudicator shall be responsible, in cooperation with the Parties, for assembling the record of the proceeding and shall maintain possession of that record for at least 1 year after issuing the Award, unless the Parties, with the Adjudicator's consent, agree otherwise.

18-3. The record of the proceeding shall include at a minimum the following: distribution pursuant to Article Three; the notice and any statements required by Article Six; any documents and depositions discovered pursuant to Article Ten; any evidence and argument (including any briefs) submitted pursuant to Article Fourteen; the record of the hearing pursuant to paragraph 18-1; and the Award pursuant to Article Seventeen.

**NINETEEN: Damages and Relief**

19-1. Upon a finding that the Employee has sustained his or her burden of persuasion, the Adjudicator may grant such relief as may be just and reasonable, including some or all of the following relief where warranted: (a) back pay (including lost benefits), less interim earnings, unemployment, retirement and disability and other benefits and severance payments received by or to be received by the Employee; (b) the expenses and costs of bringing the adjudication, if any, including reasonable attorneys' fees and costs of producing witnesses or other proof; and (c) reinstatement to the same or a substantially equivalent position with the Employer.

19-2. If reinstatement is warranted but is not reasonable or practical under the circumstances at the time the Award is issued, the Adjudicator may award to the Employee an amount equivalent to up to 2 years front pay (including benefits) from which the Adjudicator may subtract any severance payments received by or to be received by the Employee.

19-3. The computation of front pay or back pay shall be based upon, in appropriate circumstances, the Employee's

gross cash compensation including bonuses, commissions and related cash compensation.

19-4. Upon a finding that the Employer has sustained its burden of persuasion on any counterclaim, the Adjudicator may award such monetary and/or injunctive relief as may be just and reasonable.

19-5. In the Award, the Adjudicator may direct the payment, as liquidated damages, of up to 1 year of gross cash compensation in addition to other remedies described above under circumstances in which punitive, special or compensatory damages would be awardable under applicable law in the jurisdiction.

19-6. Both Parties have a duty to mitigate their damages by all reasonable means, including in the case of the Employee mitigation by way of making application for unemployment, disability, retirement or other available benefits. The Adjudicator shall take a Party's failure to mitigate into account in granting relief pursuant to Articles Nineteen and Twenty.

19-7. The Award of any damages or relief provided for in Articles Nineteen and Twenty is left to the

discretion of the Adjudicator and may be made in a bifurcated proceeding.

#### **TWENTY: Sanctions**

20-1. The Adjudicator may award either Party its reasonable attorneys' fees and costs, including reasonable expenses associated with production of witnesses or proof, upon a finding that the claim or counterclaim was frivolous or brought solely to harass the Employee, the Employer or the Employer's personnel.

20-2. The Adjudicator may award either Party its reasonable attorneys' fees and costs, including reasonable expenses associated with production of witnesses or proof, upon a finding that the other Party (a) engaged in unreasonable delay, (b) failed to comply with the Adjudicator's discovery order, or (c) failed to comply with requirements of confidentiality under the Model Procedure.

#### **TWENTY-ONE: Arbitration Statute**

21-1. Any proceeding pursuant to the Model Procedure shall be an arbitration proceeding subject to the Federal Arbitration Act, 9 U.S.C. §§ 1-16, if applicable, or, otherwise, to the law of the state of venue.



21-2. The Adjudicator shall have all powers granted to arbitrators and the Adjudicator's Award shall be enforceable as would an arbitrator's award, pursuant to the applicable statute.

21-3. If any part of the Model Procedure is in conflict with any mandatory requirement of applicable law, the statute shall govern, and that part shall be reformed and construed to the maximum extent possible in conformance with the applicable law. The Model Procedure shall remain otherwise unaffected and enforceable.

21-4. The Award may be vacated or modified only on the grounds specified in the applicable law.

#### **TWENTY-TWO: Voluntary Use of Model Procedure**

22-1. After a claim, dispute or issue has arisen, the Parties may agree in writing voluntarily to employ these Model Procedures to hear and resolve with finality that claim, dispute or issue although (a) it is not related to termination of the Employee, or (b) it is not clear that the claim is, by law, subject to final and binding arbitration.

#### **TWENTY-THREE: Court and Administrative Proceedings**

23-1. Nothing in the Model Procedure shall prevent a Party from pursuing a statutory right which is preserved by law or from bringing a proceeding pursuant to the applicable arbitration statute to vacate or enforce an Award or to compel arbitration or seek temporary equitable relief in aid of arbitration.

23-2. Subject to paragraph 23-1, the Parties agree not to commence or pursue any litigation or administrative proceeding on any claim, dispute or issue subject to the Model Procedure and will promptly move to discontinue any such proceeding if commenced.

23-3. If any litigation or administrative proceeding is pending at the time of submission of a claim under the Model Procedure, the Party who commenced the litigation or proceeding will promptly move to discontinue it. A Party who contends that a claim, dispute or issue is not subject to final and binding resolution under the Model Procedure nonetheless shall promptly move to stay any litigation or proceeding on that claim, dispute or issue pending the Adjudicator's rendering of an Award; and if that Party fails to so move, the other Party may do so.

**TWENTY-FOUR: Cancellation of Model Procedure and Reversion to At-Will Employment**

24-1. The Employer may cancel the Model Agreement and Model Procedure on 180 days' written notice to the signatory Employee, although the Procedure shall still apply to any Dispute arising before the cancellation takes effect.

24-2. Should the Model Procedure or the Model Agreement be cancelled pursuant to paragraph 24-1 or be held unenforceable in whole or in part, the employment relationship between the Employer and the Employee reverts back to an employment-at-will relationship to the extent permitted by the applicable law then in effect.

**TWENTY-FIVE: Revision of Model Procedure**

25-1. The Parties to a Dispute for which the Model Procedure has been initiated may agree in writing to vary the Model Procedure at any time before the Adjudicator gives copies of the Award to both Parties.

**TWENTY-SIX: Center For Public Resources**

26-1. In preparing and disseminating the Model Agreement and Model Procedure, the Center for Public Resources,

Inc. ("CPR") is not rendering any legal advice or opinion and is not responsible or liable to either Party for the application or enforcement of the Model Agreement and Model Procedure to specific situations.

26-2. Neither Party shall sue, join, subpoena or in any manner otherwise involve in any action or proceeding the CPR and anyone affiliated with the CPR in connection with the application or enforcement of the Model Agreement or Model Procedure.

**TWENTY-SEVEN: Effectuation of Purpose**

27-1. The Model Procedure shall be construed in a manner which is consistent with its Commentary, and the provisions of the Model Agreement and of the Model Procedure and its Commentary shall be broadly interpreted and applied so as to effectuate their purpose and spirit.

**COMMENTARY ON MODEL EMPLOYMENT TERMINATION  
DISPUTE RESOLUTION PROCEDURE**

**COMMENTARY ON ARTICLES**

**ONE: Disputes (and Parties) Subject to Model Procedure**

The Model Procedure is intended to be interpreted broadly and would encompass, to the fullest extent permitted by law, claims under any contract or the federal, state or local decisional law, statutes, regulations or constitutions. The rule of paragraph 1-2 is both procedural and substantive, in order to promote the streamlined resolution of all issues related to the terminated Employee.

Disputes between the Parties beyond those directly related to the termination decision (for example, claims for compensation or other monies owed and due as a consequence of the termination) are properly submitted for adjudication under this Model Procedure. This applies to both Employee and Employer claims. As a consequence, the enforceability of this Model Procedure may not be challenged on the grounds of a lack of

mutuality. *See Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 535 N.E.2d 643, 538 N.Y.S.2d 513 (1989). As an example, a defamation claim must be submitted under the Model Procedure if it arises out of the decision to terminate, just as would a claim that the termination violates a civil rights or whistleblower statute.

Claims relating to previous employment actions (e.g., disciplinary action or denial of salary increases in previous years), however, may not be submitted because they do not *directly* relate to the final disciplinary step of termination. Certain claims arising out of post-termination conduct, such as employment references, may be subject to the Model Procedure (unless the Parties agree otherwise). *See Fleck v. E.F. Hutton Group*, 891 F. 2d 1047 (2d Cir. 1989)(post-termination claims alleging defamation by a former employer, related to performance of former employee, are arbitrable under agreement referring disputes to New York Stock Exchange arbitration).

By virtue of the definition of "Employer", an aggrieved Employee is obligated to arbitrate any dispute relating to termination which he or she may have with another employee, including a supervisor, officer or director.



Once the Employee initiates the Model Procedure, the Employer (and, by definition, any implicated employees, officers or directors) must pursue all counterclaims under the Model Procedure, so long as they arise prior to the date of termination even if they are unrelated to the termination. The Employer, however, may not initiate the Model Procedure.

Although the focus here is on employment terminations, the Employer may amend this Model Procedure to cover other employment disputes as well.

#### **TWO: Exclusivity, Exhaustion, Waiver and Binding Effect**

The Award of the Adjudicator is intended to have the fullest force and binding effect permitted by applicable federal, state or local law. This Article establishes that all claims which are cognizable and, consequently, *can* be brought under the Model Procedure *must* be brought, and that it is the intention of the Parties that all disputes related to and arising out of the termination decision may be heard and resolved only pursuant to the Model Procedure.

Clearly, where federal, state or local law prevents contractual preclusion of certain claims, or the filing of such claims,

the Model Procedure cannot displace appropriate judicial or administrative consideration. This Article, however, bars any action or claim which could have been brought pursuant to the Model Procedure, unless a court holds otherwise.

Accordingly, Article Two introduces the principle of "exhaustion of remedies", compelling use of the Model Procedure even in those situations in which the determination of the arbitrator (known here as an "Adjudicator") will not be binding, although it may be given some weight in a subsequent court or administrative proceeding. Compare *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974) (Title VII claim is not subject to compulsory arbitration under collective bargaining agreement, but arbitrator's decision may be entitled to some weight), *Utley v. Goldman Sachs & Company*, 883 F. 2d 184 (1st Cir. 1989), *cert. denied* 110 S. Ct. 842 (1990) (court refused to enforce arbitration of Title VII claim, under New York Stock Exchange arbitration agreement), and *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3d Cir. 1989) (claim under Age Discrimination in Employment Act is not subject to compulsory arbitration under pre-dispute agreement), and *Alford v. Dean Witter Reynolds, Inc.*, 905

F.2d 104 (5th Cir. 1990) (fired broker could pursue Title VII suit for sex discrimination, rather than subject to commercial arbitration under employment agreement); with *Shearson Lehman/American Express, Inc. v. Bird*, 110 S. Ct. 225 (1989), *remanded*, mem. op., No. 88-7704 (2d Cir. Jan. 19, 1990) (Second Circuit ordered to reconsider its ruling that a private agreement to arbitrate pension fund claims is not enforceable as to claims based on substantive violations of the Employee Retirement Income Security Act of 1974), *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989) (the Federal Arbitration Act requires enforcement of a private agreement between a securities firm and an investor to arbitrate claims arising under the Securities Act of 1933, just as statutory claims under the Securities Act of 1934, federal antitrust laws, and the Racketeer Influenced and Corrupt Organizations Act are subject to arbitration), *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), *petition for cert. granted*, 59 U.S.L.W. 3212 (October 1, 1990) (enforcing arbitration of age discrimination claim as being consistent with the ADEA; court expressly disagreed with Third Circuit in *Nicholson* case), *Hall v. Nomura Securities International*,

1990 Cal. App. LEXIS 318 (Cal. Ct. App. 1990), *motion for reconsideration denied* (Cal. Ct. App. 1990) (in reliance upon the Federal Arbitration Act, arbitration under pre-dispute agreement was properly compelled of fired employee's age and disability discrimination claims brought under California's Fair Employment and Housing Law), and *DeSapio v. Josephthal and Co.*, 143 Misc. 2d 611, 540 N.Y.S.2d 932 (Sup. Ct. N.Y. Co. 1989) (Altman, J.) (claim of disability discrimination under New York's Executive Law is referable to arbitration in an action to compel arbitration pursuant to New York's CPLR and the Federal Arbitration Act).

The law's conclusion, however, that certain claims must later be heard in another forum should not bar the initial adjudication of the same claim in the contractually-established forum. Article Two sets forth the Parties' agreement on this point, and the primacy of the Model Procedure is bolstered by Article Twenty-Three.

The enforceability of this exhaustion requirement will have to await a judicial determination. A question as to whether the Dispute is capable of being adjudicated to finality, however, should not be a basis for staying an adjudication. After

all, the Parties agree to submit all Disputes for resolution, and the Adjudicator's Award "shall be accorded the fullest weight permitted by law" as subsequently determined upon review in court or by an administrative agency.

### **THREE: Distribution of Model Procedure**

The goal of Article Three is to ensure that these Model Procedures are communicated to the Employee both upon commencement of employment (or adoption of the Model Procedure after employment has begun) *and* at the time the Employer gives notice of termination.

### **FOUR: Time Limit To Initiate Model Procedure**

The 180-day time limit is intended to encourage a prompt filing of claims and, consequently, an expeditious resolution of the dispute. The extension of the time limit to 1 year is designed to encourage the Employer to comply with this disclosure requirement.

### **FIVE: Representation**

This provision places no restrictions on the Parties' selection of representatives. There may be an advantage to representation by counsel, especially in those matters in which the

application and interpretation of protective legislation, such as the civil rights laws, are at issue. Accordingly, the Employer may encourage the Employee to retain legal counsel in those matters.

### **EIGHT: The Adjudicator**

Providing the recently terminated Employee with the option to go to a neutral organization for the selection of an Adjudicator substantially enhances the reality of fairness and the perception of it in the Employee's eyes and undoubtedly upon review in court.

It is anticipated that, upon the request of either party, the AAA will assist in selecting an Adjudicator who has the experience and qualifications desired by the Parties. Paragraph 8-2 removes any financial impediment to an Employee's seeking to select an Adjudicator with AAA assistance by requiring the Employer to advance the filing fee.

If the mutually acceptable choice of Adjudicator is not made by the Parties, the AAA ultimately will make the designation in conformance with its Commercial Arbitration Rule 13.



"If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the panel."

"Each party to the dispute shall have ten days from the mailing date in which to cross off any names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of

an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the panel without the submission of additional lists."

Other than to appoint an Adjudicator under Rule 13, however, the AAA has no role, and neither its other rules nor its administrative fee schedule for commercial arbitration cases (other than its filing fee, currently \$300.00) will apply.

If the Dispute involves a claimed violation of a civil rights or other statute, it would be prudent to select as the Adjudicator either a former judge or an attorney who has special competence and experience in the interpretation and application of that statute. The AAA must be notified of the Parties' needs in this regard.

#### **TEN: Discovery**

Article Ten guarantees limited discovery to the Parties under the supervision of the Adjudicator. The Employee is expressly provided with the opportunity to depose one Employer representative on the assumption that the Employer has more thorough access to the reasons for the termination than does the terminated Employee.

The Employee is also entitled to a copy of his or her personnel records unless the Adjudicator determines, upon a showing of good cause, to exclude certain material, such as confidential business or medical information, or the identity of confidential sources. Pre-employment records, on the other hand, ordinarily are not discoverable because of the overriding expectation of confidentiality normally afforded them. If the Dispute focused, however, upon a misrepresentation by the Employee during the pre-employment stage, such as on the Employee's application, the application would be relevant and should be produced, as ordinarily should an Employer's written report, if any, of the misrepresentation.

Because the Adjudicator may grant additional discovery, the Employer may seek, for example, the Employee's deposition and the Employee may seek pre-employment records; the moving Party, however, bears the burden of demonstrating "good cause", including the relevance of and substantial demonstrable need for the additional discovery.

The Adjudicator's resolution of any discovery dispute is not subject to judicial review. Moreover, the availability of sanctions under Article Twenty should act as an incentive to cooperate in discovery and comply promptly with an Adjudicator's decision on a discovery dispute.

#### **TWELVE: Order of Presentation**

The Employer, which presumably best knows the reasons for the termination, must present its evidence first, before the Employee puts in his or her proof regarding the termination. Article Twelve states only the order of production of evidence and is not intended to place the burden of persuasion on the Employer.

#### **THIRTEEN: Standard and Burden of Persuasion**

To prevail, the Employee must demonstrate that the Employer did not have any legitimate business reason for the

discharge. The Parties, by adopting expressly this standard, have waived any argument that another standard or burden should apply. Placing the burden of persuasion on the Employee distinguishes the Model Procedure from labor arbitration in which the Employer typically bears the burden of demonstrating that there was "just cause" for the discharge.—

In deciding whether the Employee has met this burden, the Adjudicator is expected to take into account the Employee's position and responsibilities as well as the Employer's policies and applicable law. Any reason that would be a violation of Title VII of the Civil Rights Act of 1964 and other federal, state or local fair employment legislation would not be a "legitimate business reason".

The burden placed on the Employee here is roughly comparable to what would be encountered in litigation on the same claims. By way of illustration, a female Employee may claim that her discharge for a rules violation amounts to sexual discrimination unlawful under Title VII of the Civil Rights Act of 1964, in that she was fired in reality as a result of her manager's stereotypical gender-based view of her work, or perhaps because

she spurned his advances. Although this Employee may bear the initial and ultimate burden of persuasion on the termination decision, the Employee will demonstrate that the Employer had no legitimate reason to fire her if she produces direct evidence of a Title VII violation, as would be required by *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) (once an employee proves that gender played a "motivating part" in an employment decision, the burden of proof shifts to the employer to prove by a "preponderance of evidence" that the decision would have been the same had such illegal discriminatory motive not played any part), or otherwise satisfies her initial burden under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and the Employer fails to introduce evidence required by those cases. See *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) (burden of persuasion remains with Title VII civil rights plaintiff at all times).

#### **FOURTEEN: Evidence and Argument**

Article Fourteen ensures that each Party has a full, fair, and fundamentally equal opportunity to present evidence and



argument in accordance with due process. As it is commonplace in arbitration, however, rules of evidence are not to be strictly applied. The Adjudicator's determination of relevancy, materiality, or any other evidentiary question, including on an issue of attorney-client privilege or work product, is not subject to judicial review.

#### **FIFTEEN: Confidentiality**

The proceedings are not open to the public unless otherwise agreed in writing by the Parties.

The Adjudicator's Award is kept confidential unless otherwise agreed or necessary in any subsequent proceedings between the Parties, or by a governmental agency (such as to satisfy an inquiry of the Internal Revenue Service) or other legal process (such as a valid third party subpoena).

Prior Awards, issued within the past year and relevant to the instant Dispute, are available in redacted form in subsequent proceedings, and all information about them, including that which the Employer may choose to disclose orally, must be held in confidence.

To encourage strict confidentiality, Article Twenty sanctions may be awarded for breach of Article Fifteen.

#### **SIXTEEN: Expenses**

This provision requires the Employer to bear the bulk of expenses. The Employee's fee cap of 2 days' gross compensation is minimal and should not inhibit the Employee's use of the Model Procedure. The Employer, of course, may always waive this apportionment.

Certain expenses excluded from apportionment under Article Sixteen, however, may be awarded pursuant to Article Nineteen or Twenty.

#### **SEVENTEEN: The Award**

By this provision, the Adjudicator may not take into account extraneous information or views or mete out his or her own brand of "industrial justice" in resolving Disputes under the Model Procedure.

Article Seventeen compels the Adjudicator to state findings of fact and offer bases for the decision in a writing which the Parties would be likely to consider to be dispositive of the

matters in dispute and which can be reviewed and analyzed, if permitted by law, in any subsequent proceedings.

#### **NINETEEN: Damages and Relief**

The Adjudicator may award to an Employee reinstatement, back pay, and costs and expenses, including attorneys' fees. If the Adjudicator determines that reinstatement is warranted but not reasonable or appropriate under the circumstances, front pay of up to 2 years may be awarded. Such circumstances may include a dramatic change in the nature of the work or character of the workforce in the interim period, the utter incompatibility of the Parties, or the demonstrated inability of the Parties to work together in an effective manner, or other legitimate reasons.

An Employee has a duty to mitigate damages, and any Award of back pay will be reduced by interim earnings and by unemployment, disability, severance and/or retirement or other benefits. Front pay may also be reduced by severance payments. For example, as a matter of equity or to avoid unjust enrichment, the Adjudicator may decide to reduce an award of front pay by an Employer's *ad hoc* or enhanced payment of severance pay which

the Employer had no legal obligation to make. On the other hand, the Adjudicator may find that it would be unfair to subtract from front pay severance payments made under a formal plan since the award of front pay assumes that the Employee will not be reinstated, at which point the Employee would be entitled to the severance payments already received under the terms of the plan.

The Model Procedure also recognizes that in some states the Employee, by agreeing to the Model Procedure, surrenders certain causes of action that could result in the awarding of compensatory or punitive damages. Paragraph 19-5 gives the Adjudicator the option of awarding up to 1 year in liquidated damages in circumstances where the employee might otherwise be entitled to compensatory or punitive damages under federal or state law, such as damages which may arise from an injury to reputation resulting from a defamatory statement. *Compare Fahnestock & Co., Inc. v. Waltman*, \_\_\_\_\_ F. Supp. \_\_\_\_\_, 1990 U.S. Dist. LEXIS 11024 (S.D.N.Y. 1990) (arbitration panel under New York Stock Exchange rules did not exceed their authority in awarding former manager of securities firm \$50,000 for wrongful termination, \$100,000 for defamation and \$14,000 in attorneys'

fees; however, \$100,000 punitive damages award was disallowed since, in application of *Garrity v. Lyle Stuart*, 40 N.Y.2d 354 (1976), arbitrators are powerless to award punitives even if agreed upon by the parties), with *Raytheon Company v. Automated Business Systems, Inc.*, 882 F.2d 6 (1st Cir. 1989) (upholding punitive damages award, in application of strong federal policy favoring arbitration, under circumstances "where such conduct could give rise to punitive damages if proved to a court" *id.* at 12). An Award of liquidated damages, however, is subject to all requirements of an Award made pursuant to Article Seventeen.

The Adjudicator also retains the discretion to hold a bifurcated proceeding -- *i.e.* a separate proceeding following the Adjudicator's determination of liability -- for the purpose of determining the award of damages.

These remedies are not automatic, and the discretion to award any of them remains with the Adjudicator.

#### **TWENTY: Sanctions**

Any award of sanctions will be enforceable as an arbitrator's Award under federal or state law. Without this power to sanction, the Model Procedure could be used by either Party as

a means to abuse the process rather than seek resolution of the Dispute.

#### **TWENTY-ONE: Arbitration Statute**

Article Twenty-One confirms that an adjudication proceeding pursuant to the Model Procedure is an arbitration proceeding and subject to and governed by the Federal Arbitration Act, unless its jurisdictional requirement of interstate commerce is not met. In that event, state arbitration law applies.

#### **TWENTY-TWO: Voluntary Use of Model Procedure**

Article Twenty-Two provides that the Parties may agree, after a Dispute has arisen, to proceed under the Model Procedure on matters that by law may not be subject to final and binding arbitration (for example, if certain case law is read broadly, allegations of race or sex discrimination). These pre-dispute procedures are transformed, in effect, to post-dispute procedures as the Parties acknowledge prior to proceeding that the law might not otherwise permit final and binding arbitration of the claim.

Disagreement over the arbitrability of a claim (for example, of race or sex discrimination), however, does not excuse



a Party from application of the Model Procedure in the first instance, as explained in Articles Two and Twenty-Three.

**TWENTY-THREE: Court and Administrative Proceedings**

Article Twenty-Three provides that a Party will not proceed with and will discontinue or stay, to the extent permitted by law, any litigation or administrative proceeding on a claim that is subject to the Model Procedure. In this way, duplication of expense and remedies is eliminated.

This requirement will not prevent a Party from exercising his or her statutory right, if expressly preserved by law, to file a claim with an administrative agency.

For those claims that are not subject to final and binding resolution under the Model Procedure, or where the right to pursue a statutory claim is expressly preserved by law, a Party may still pursue its other action though this may require that Party to petition the court or agency for a stay of that proceeding so that the Adjudication may proceed first. As a practical matter, in most instances, this should not result in any material delay or injustice, since a proceeding under the Model Procedure will usually precede

a trial or hearing in a litigation or administrative action raising the same issues.

**TWENTY-FOUR: Cancellation of Model Procedure and Reversion to At-Will Employment**

Article Twenty-Four provides that, upon cancellation of the Model Procedure or upon a finding that the Model Procedure is unenforceable, the relationship between the Parties shall revert back to what it would have been under the applicable state law (and what it would have been in the absence of the Model Agreement), which in a vast majority of states will be employment-at-will or some variation thereof.

**TWENTY-FIVE: Revision of Model Procedure**

Article Twenty-Five seeks to inject some flexibility in the Model Procedure so that it may be adapted to the special needs of the Parties. The Model Procedure should not be amended or revised in such a way, however, so as to undermine its fundamental fairness.

DEC 18 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

ROBERT D. GILMER,  
v. *Petitioner,*

INTERSTATE/JOHNSON LANE CORPORATION,  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

**BRIEF AMICUS CURIAE OF THE CHAMBER OF  
COMMERCE OF THE UNITED STATES OF AMERICA  
IN SUPPORT OF THE RESPONDENT**

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1990

\_\_\_\_\_  
No. 90-18

ROBERT D. GILMER,  
v. *Petitioner,*

INTERSTATE/JOHNSON LANE CORPORATION,  
*Respondent.*

\_\_\_\_\_  
On Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

\_\_\_\_\_  
BRIEF AMICUS CURIAE OF THE CHAMBER OF  
COMMERCE OF THE UNITED STATES OF AMERICA  
IN SUPPORT OF THE RESPONDENT

\_\_\_\_\_  
INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 180,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional organizations in the United States.

A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a

wide spectrum of labor relations litigation before this Court.<sup>1</sup>

The instant case involves the issue of whether an agreement between an individual employee and his employer to arbitrate all claims arising out of employment is enforceable under the terms of the Federal Arbitration Act ("FAA" or "Arbitration Act"), 9 U.S.C. §§ 1, *et seq.* (1988), when the claim against the employer is one for violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.* (1988). Relying on the reasoning and holdings of this Court in a recent trilogy of FAA cases,<sup>2</sup> the Fourth Circuit correctly answered this question in the affirmative. Appendix to the Petition for Writ of Certiorari ("P. App.") 1a-36a. However, Petitioner contends that the Fourth Circuit's conclusion is foreclosed by the Court's earlier decisions in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), and its progeny<sup>3</sup> and by the purposes of ADEA.

A resolution of this issue is of vital concern to the Chamber and its members, many of whom have individual arbitration agreements with at least some of their employees. These agreements have been adopted in response to the extraordinary growth of employment-

<sup>1</sup> *E.g.*, *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

<sup>2</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. —, 104 L. Ed. 2d 526 (1989).

<sup>3</sup> *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

related litigation and the equally extraordinary increase in the cost of litigating such claims. Voluntary binding arbitration provides a means for resolving such employment claims in a forum that is quicker, more efficient, less disruptive, and less expensive, and one that has the same access to expertise as the judicial forum because the arbitrator can be selected with an eye to the nature of the claim.

The instant case will determine whether such arbitration agreements are enforceable with respect to age discrimination claims, which represent one of the fastest-growing areas of employment litigation. Moreover, the Court's rationale will also undoubtedly clarify whether such agreements have any vitality with respect to claims arising under other statutes relating to employment. Accordingly, with the consent of all parties pursuant to Supreme Court Rule 37.3, the Chamber submits this brief *amicus curiae* urging the Court to affirm the decision of the Fourth Circuit compelling the arbitration of Petitioner's ADEA claim.

#### SUMMARY OF THE CASE

Petitioner Gilmer, an experienced securities agent (Joint Appendix ("J.A.") 44), was hired by Respondent Interstate/Johnson Lane Corporation ("Interstate") in 1981 as Manager of Financial Services. J.A. 21. As required for his employment, Gilmer executed a securities representative's registration form with the New York Stock Exchange ("NYSE") in which he "agree[d] to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions or by-laws of the organization with which I register. . . ." J.A. 18. Among the latter was a provision, NYSE Rule 347, which provided for the arbitration of "any controversy . . . arising out of the employment or termination of employment" of a registered securities agent. J.A. 10-11.



Six years later, in 1987, Interstate terminated Gilmer's employment. In direct contravention of his agreement to arbitrate, Gilmer responded by filing suit in federal district court alleging that his termination violated ADEA. J.A. 4-8, 11. Interstate moved to dismiss the complaint and compel arbitration as authorized under the FAA, 9 U.S.C. §§ 3, 4 (J.A. 11), and in reliance upon this Court's holdings and rationale in *Mitsubishi* and *McMahon*. J.A. 22-39. However, the district court denied the motion, ruling that this Court's earlier decision in *Gardner-Denver* established, in effect, that "arbitration procedures" are inadequate for the "final resolution" of discrimination claims such as those under ADEA and that "Congress intended to protect ADEA claimants from the waiver of a judicial forum." J.A. 87.

On appeal, the Fourth Circuit reversed, agreeing with Interstate that resolution of the arbitration issue was controlled by the rationale set forth in this Court's FAA trilogy, not by the rationale of *Gardner-Denver* and its progeny. P. App. 23a-27a. According to the appellate court, *Mitsubishi* clearly established that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." P. App. 6a. Thus, following the teachings of the FAA trilogy, the Fourth Circuit concluded that Gilmer's individual arbitration agreement must be enforced unless Congress evidenced an intent to preclude waiver of the judicial forum available to an ADEA claimant. P. App. 6a-7a. Finding no such intent discernible in the ADEA's text, legislative history or underlying purposes, the Fourth Circuit held that Gilmer's ADEA claim must be arbitrated. P. App. 3a-36a.

## SUMMARY OF THE ARGUMENT

The Court should hold that the rationale of the FAA trilogy rather than that of *Gardner-Denver* and its progeny controls the issue of whether claims arising under employment discrimination statutes are arbitrable pursuant to an individual arbitration agreement. In the FAA trilogy, this Court announced in a clear and decisive voice that individual agreements to arbitrate are enforceable with respect to federal statutory claims. The Court held that the FAA's mandate to enforce individual arbitration agreements must be followed unless it can be shown that Congress intended to preclude a waiver of the judicial forum for the statutory claim. Such an intention must be deducible from the text or the legislative history of the statute or from an inherent conflict between arbitration and the statute's underlying purposes.

There is nothing in the text or legislative history of ADEA indicating Congress' intention to preclude waiver of the judicial forum by a claimant. Furthermore, insofar as this Court has found no inherent conflict between compelling the arbitration of claims arising under the 1933 and 1934 Securities Acts and the Sherman Act, statutes which implicate issues of broad public importance, the Court should not find a conflict between compelling the arbitration of claims arising under ADEA.

The rationale and holdings of *Gardner-Denver* and its progeny are inapplicable to the issue of whether claims arising under ADEA, Title VII, 42 U.S.C. § 1983 or the FLSA are arbitrable pursuant to an individual arbitration agreement. Those cases involved labor arbitrations, which as this Court properly recognized, are intended to resolve contractual disputes and foster harmonious relations between unions and management. A labor arbitrator is expected to interpret and effectuate the terms of the collective bargaining agreement not vindicate an individual's statutory rights. In contrast, the arbitration in this case as well as any other arbitration pursuant to

an individual arbitration agreement will concern itself with resolving the particular statutory claim at issue, and, moreover, the arbitrator is expected to resolve the dispute and award damages in accordance with the terms of the underlying statute.

## ARGUMENT

### THE FAA MANDATES ENFORCEMENT OF INDIVIDUAL ARBITRATION AGREEMENTS WITH RESPECT TO STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS

In the late 1980s this Court issued three decisions dealing with the fundamental predicate issue that underlies the instant case—whether federal statutory claims may be subject to mandatory arbitration under the Federal Arbitration Act.<sup>4</sup>

Given the clarity and decisiveness with which the Court spoke in this trilogy of FAA cases, one would suppose that the instant case would involve a straightforward application of the standards and criteria the Court there enunciated for deciding the arbitrability of statutory claims. However, Petitioner and his *amici curiae* argue, in effect, that, over a decade earlier in *Gardner-Denver* and its progeny,<sup>5</sup> the Court had already conclusively resolved questions relating to the arbitrability of federal employment discrimination claims. They suggest that the Fourth Circuit's decision herein can be affirmed

<sup>4</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) ("*Mitsubishi*"); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) ("*McMahon*"); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. —, 104 L. Ed. 2d 256 (1989) ("*Rodriguez*").

<sup>5</sup> *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981) ("*Barrentine*"); *McDonald v. City of West Branch*, 466 U.S. 284 (1984) ("*McDonald*"). For ease of reference, these cases are sometimes referred to as "the *Gardner-Denver* trilogy."

only if the Court is willing to overrule those earlier decisions.

The following sections demonstrate that such a step is wholly unnecessary. The first section deals with the Court's FAA trilogy and the standards for determining when the arbitration of statutory claims may be compelled. The second section explains how the *Gardner-Denver* trilogy fits within our nation's system of industrial self-government and why it is consequently not controlling in the instant case. Finally, we show that proper application of the FAA standards warrants affirmance of the Fourth Circuit's judgment.<sup>6</sup>

#### A. The FAA Trilogy Establishes That Statutory Claims Must Be Arbitrated Absent a Showing of Contrary Congressional Intent

It has long been recognized that Congress enacted the Federal Arbitration Act to reverse longstanding judicial hostility against arbitration agreements which had existed in the English common law and had been adopted by the American courts. H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924), cited in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 & n.6 (1985). Through the FAA, Con-

<sup>6</sup> Petitioner's *amici*, but not Petitioner himself, contend that the FAA does not apply to arbitration agreements contained in employment contracts. See, e.g., *amicus* brief of the AFL-CIO in support of Petitioner. Petitioner never raised this issue in either the courts below or his petition for certiorari, and the Chamber thus assumes that the Court will not decide the question. See, e.g., *DeShaney v. Winnebago Social Services*, 489 U.S. 189, 195 n.2 (1989) (Court will decline to consider issue first raised in petitioner's brief on the merits). Indeed, it would be particularly inappropriate to vary that rule here since, as pointed out in Respondent's brief, Petitioner's agreement to arbitrate is contained in his registration agreement with the New York Stock Exchange, not merely in his employment contract. In view of these circumstances, the Chamber's brief does not address the reach of the FAA but instead merely adopts the arguments on this point made by Respondent.



gress sought to ensure that the courts would enforce arbitration agreements as they would any other contract: "Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement." *Id.*, cited in *Byrd*, 470 U.S. at 219-21 & n.6.

Despite this recognition, it was not until 1985 that this Court concluded that the FAA presumptively requires the arbitration of claims asserting federal statutory rights. *Mitsubishi*, 473 U.S. at 625-27. See also *McMahon*, 482 U.S. at 226-27; *Rodriguez*, 104 L. Ed. 2d at 533-36.<sup>7</sup> The Court reasoned that, on its face, the FAA mandates the arbitration of all claims that the parties have agreed to resolve by arbitration and that this mandate "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S. at 226.

The Court found no inconsistency between the presumptive arbitrability of statutory claims and the assurance that statutory rights are protected. First, the Court recognized that, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitrable, rather than a judicial forum." *Rodriguez*, 104 L. Ed. 2d at 534; *Mitsubishi*, 473 U.S. at 628. Second, the Court also recognized that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals should inhibit enforcement of the Act in controversies based on statutes." *McMahon*, 482 U.S. at 226. See also *Mitsubishi*, 473 U.S. at 626-27.

Thus, the Court concluded that the "Arbitration Act, standing alone, . . . mandates enforcement of agreements

<sup>7</sup> The Court had earlier held the view that rights conferred by statute could not appropriately be enforced by arbitration. *Wilko v. Swan*, 346 U.S. 427 (1953).

to arbitrate statutory claims" unless the statute in question overrides the FAA's mandate by prohibiting waiver of the judicial forum for the statutory right at issue. *McMahon*, 482 U.S. at 226. The burden is on the party opposing arbitration to demonstrate such a contrary congressional intent either in the text or legislative history of the statute or from an inherent conflict between arbitration and the underlying purposes of the statute. *Id.* at 227.

Contrary to the assertions of the Petitioner and his *amici curiae*, this Court should affirm the Fourth Circuit's decision compelling arbitration of the Petitioner's ADEA claim under the FAA. As shown in the remainder of this brief, the Fourth Circuit properly found the *Gardner-Denver* trilogy inapplicable to this case and correctly applied the Court's teachings in the FAA trilogy in concluding that neither the ADEA's text, its legislative history, nor its underlying purposes precluded waiver of the judicial forum. P. App. 1a-36a.

**B. The Rationale of *Alexander v. Gardner-Denver* and Its Progeny Is Inapplicable to the Issue of Whether Claims Arising Under Federal Employment Discrimination Statutes Are Arbitrable Pursuant to an Individual Arbitration Agreement**

Petitioner and his *amici* contend, at bottom, that this Court has already performed the analysis necessary to determine whether ADEA claims are subject to compulsory arbitration under the Federal Arbitration Act. They argue that, taken together, *Gardner-Denver*, *Barrentine* and *McDonald* establish that arbitration is an inadequate substitute for judicial determination of employee rights under employment discrimination statutes and other laws designed to provide minimum substantive guarantees to individual workers. Any facial appeal of these arguments evaporates when one considers the Court's subsequent decisions in the FAA trilogy and the labor relations context of the *Gardner-Denver* trilogy.



*Gardner-Denver*, *Barrentine* and *McDonald* all involved labor arbitrations under collective bargaining agreements negotiated between employers and unions rather than private arbitration pursuant to individual employee-employer agreements. In each case, the Court held that a labor arbitrator's rejection of the employee's claim would not preclude or collaterally estop the employee from raising the same or similar claims in federal court pursuant to statute. See *Gardner-Denver* (claims under Title VII of the Civil Rights Act); *Barrentine* (claims under the Fair Labor Standards Act ("FLSA")); *McDonald* (claims under 42 U.S.C. § 1983).

It is clear that the conclusions in these cases were premised on the Court's view that labor arbitration would not adequately protect statutory rights, rather than on the nature of the statutes themselves.<sup>8</sup> First, the Court repeatedly emphasized that labor arbitrators are confined to deciding contract claims—not statutory claims—and

<sup>8</sup> While *Gardner-Denver* and its progeny do contain some discussion of the nature of the statutes in issue, the Court apparently found it necessary only to ascertain that Congress intended to give aggrieved employees access to the courts and also intended to preclude the waiver of substantive statutory rights by either individual employees or their collective bargaining representative. See, e.g., *McDonald*, 466 U.S. at 290 (only limited discussion of Section 1983); *Gardner-Denver*, 415 U.S. at 51 (distinguishing Title VII rights from statutory rights concerning majoritarian processes (e.g., the right to strike) that may be waived by a union); *Barrentine*, 450 U.S. at 740-41 (finding only that substantive rights under the FLSA are nonwaivable). Moreover, to the extent the Court focused on specific congressional intent regarding arbitrability, it apparently searched for an indication that Congress intended to permit compulsory arbitration. See *Gardner-Denver*, 415 U.S. at 47 ("There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction."). That is just the opposite of the inquiry the Court prescribed in the FAA trilogy. See, e.g., *McMahon*, 482 U.S. at 226-27 (arbitration agreement will be enforced unless party opposing arbitration can show that Congress intended to preclude compulsory arbitration).

that they are not even permitted to base their decisions on their view of statutory requirements. *Gardner-Denver*, 415 U.S. at 53. See also *Barrentine*, 450 U.S. at 744; *McDonald*, 466 U.S. at 290-91. Second, the Court emphasized that labor arbitrators' specialized competence "pertains primarily to the law of the shop, not the law of the land," and hence the Court feared that arbitrators would lack the expertise required to resolve statutory claims. *Gardner-Denver*, 415 U.S. at 57. See also *Barrentine*, 450 U.S. at 743; *McDonald*, 466 U.S. 290-91. Third, the Court expressed concern that in labor arbitration the contracting union usually has exclusive control over the manner and extent to which an individual grievance is prosecuted, and that union and employee interests "are not always identical or even compatible." *McDonald*, 466 U.S. at 291. See also *Gardner-Denver*, 415 U.S. at 58 n.19; *Barrentine*, 450 U.S. at 742. Finally, the Court was concerned that the informal procedures of arbitration would produce "arbitral factfinding [which] is generally not equivalent to judicial factfinding." *McDonald*, 466 U.S. at 291. See also *Gardner-Denver*, 415 U.S. at 57-58.

These views plainly cannot be squared with the view of arbitration expressed in the Court's subsequent FAA trilogy. E.g., *Rodriguez*, 104 L. Ed. 2d at 534-35 ("[T]o the extent that [a court's decision not to enforce an arbitration agreement] rest[s] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."); *McMahon*, 482 U.S. at 232 ("[T]he streamlined procedures of arbitration do not entail any consequential restriction on substantive rights."); *Mitsubishi*, 473 U.S. at 673 ("We decline to indulge the presumption that the parties and the arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators"). See also Sec-

tion C(3), *infra*, where we deal with Petitioner's specific attack on the adequacy of the arbitral forum.

There are two possible explanations for these contrasting views of arbitration: either the Court has substantially modified its view concerning the adequacy of arbitration generally, or it was describing different kinds of arbitration in the two lines of cases. While the Chamber would welcome the Court's decision to revisit the *Gardner-Denver* rationale,<sup>9</sup> we show below that that is unnecessary since the two lines of cases can be reconciled when one considers the labor relations context in which the *Gardner-Denver* trilogy arose.

Initially, the Court has long recognized that both collective bargaining agreements and arbitration pursuant to such agreements cannot be likened to ordinary commercial or service contracts. The collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). It "is an effort to erect a system of industrial self-government." *Id.* at 580. Furthermore, the grievance-arbitration machinery of collective bargaining agreements

is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for

<sup>9</sup> In *Rodriguez*, the Court candidly acknowledged that its view of arbitration had moderated. 104 L. Ed. 2d at 534. Moreover, *Gardner-Denver* itself recognized that some arbitration proceedings would contain sufficient safeguards to justify according those arbitral resolutions "great weight" in subsequent judicial proceedings. 415 U.S. at 60 n.21. Thus, the Court's more recent views of arbitration might indicate an ultimate conclusion that arbitration generally has become sophisticated enough to warrant a presumption of adequacy absent evidence of fraud, bias, or some other factor sufficient to overturn an award.

their solution in a way which will generally accord with the variant needs and desires of the parties.

*Id.* at 581.

Given these views, it is not at all surprising that the Court also long ago concluded that labor arbitration is of a fundamentally different character from arbitration pursuant to private agreements: "In a commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. . . . [It] is part and parcel of the collective bargaining process itself." *Id.* at 578.

It is no less surprising that these considerations have led the Court to conclude that labor arbitrators have special functions not shared by the "arbitrator as judge":

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. . . ."

. . . [Rather, the] arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop. . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says, but . . . such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished.

*Id.* at 581-82, quoting Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016 (1955).

In short, as this Court recognized in *Gardner-Denver* and its progeny, labor arbitration is a special brand of dispute resolution in which the arbitrator is a



proctor of the bargain [whose] task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties. . . . If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be enforced. . . . Thus the arbitrator has authority to resolve only questions of contractual rights [not statutory rights].

*Gardner-Denver*, 415 U.S. at 53-54, quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

While these considerations obviously underlay the *Gardner-Denver* trilogy, they just as obviously have no applicability to arbitration pursuant to individual, private agreements. For example, in the context of the arbitration of claims arising under the 1933 and 1934 Securities Acts, one commentator has noted:

[U]nlike labor arbitration, commercial arbitration often depends on legal standards external to the contract . . . . Many commercial arbitration agreements explicitly refer to sources of external law that the arbitrator is charged to apply . . . . Even when the arbitration clause makes no such reference, commercial arbitrators look to relevant law governing the trade or transaction . . . .

Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an Adequate Substitute for the Courts?*, 68 Tex. L. Rev. 509, 532 (1990). Thus, "there is no reason to assume . . . that arbitrators will not follow the law" when specifically called upon to decide

claims arising under employment discrimination statutes and other laws providing minimum job guarantees. *McMahon*, 482 U.S. at 232.

Furthermore, unlike a grievant in a labor arbitration, a complainant such as the Petitioner has complete control over the presentation of his ADEA claim to an arbitrator, the arbitration is pursuant to an agreement entered into and signed by the complainant himself, and the complainant may be represented "by counsel at any stage of the" arbitration. NYSE Arbitration Rule 614, 2 N.Y.S.E. Guide (CCH) ¶ 2614 (1989).

In sum, the concerns underlying the rationale of *Gardner-Denver* and its progeny are inapplicable to the arbitration of statutory claims pursuant to an individual agreement. Thus, these decisions provide no reason for the Court to "skew the otherwise hospitable inquiry into arbitrability" under the FAA. *McMahon*, 482 U.S. at 226 (quoting *Mitsubishi*, 473 U.S. at 627).<sup>10</sup>

<sup>10</sup> The Court's decision in *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987), does not dictate a different conclusion. *Buell* did not involve the question of the FAA enforceability of an individual arbitration agreement with respect to a statutory claim. Rather, the issue before the Court was whether the availability of "labor arbitration" under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.* (1988), precluded an injured employee from bringing a tort claim in court under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51, *et seq.* (1988). Consistent with *Gardner-Denver* and its progeny, the Court ruled against preclusion, finding that labor arbitration under the RLA, like labor arbitration under the LMRA, is intended "to promote stability in labor-management relations" not to vindicate statutory rights. *Buell*, 480 U.S. at 561-66 & n.9 (quoting *Union Pacific Ry. Co. v. Sheehan*, 439 U.S. 89 (1978)).

Because *Buell* did not involve the enforceability of an individual arbitration agreement with respect to a statutory claim, the Petitioner has no basis for claiming that "*Buell* . . . demonstrates that this Court has wisely treated employment discrimination and related claims as 'a breed apart' from the kinds of claims at issue" in the FAA trilogy. Petitioner's Brief 11-12.



**C. Neither ADEA's Text, Its Legislative History, nor Its Underlying Purposes Preclude Waiver of the Judicial Forum**

It is clear from the foregoing that the *Gardner-Denver* trilogy does not control the inquiry into whether statutory employment discrimination claims may be subject to compulsory arbitration pursuant to an individual agreement to arbitrate. Instead, that question must be decided by application of the Court's usual FAA criteria, and arbitration of Petitioner's ADEA claim may be foreclosed only if he can demonstrate that ADEA's text, legislative history or underlying purposes preclude waiver of the judicial forum provided by ADEA.

As was the case for the statutes involved in the Court's FAA trilogy, arbitration is nowhere mentioned in the text of ADEA, and "this silence in the text is matched by silence in the statute's legislative history." *McMahon*, 482 U.S. at 238. Furthermore, there is no statement in either the text or the legislative history of ADEA indicating that Congress intended the federal judicial forum to be the only appropriate forum for the vindication of those rights.<sup>11</sup>

Because the text and legislative history of ADEA are silent on the issue of arbitration, Petitioner and his *amici curiae* argue that waiver of the judicial forum is precluded because there is an inherent conflict between the purposes of ADEA and arbitration. They attempt to

<sup>11</sup> Petitioner's citation to the Joint Explanatory Statement of the Committee of Conference on the 1990 Civil Rights Act for the proposition that Congress intended to preclude waiver of the judicial forum in ADEA is unavailing. This statement cannot be evidence of congressional intent on any issue since the Civil Rights Act of 1990 was never enacted into law. See *Tahoe Regional Planning Agency v. McKay*, 769 F.2d 534, 539 (9th Cir. 1985) (action on a proposed amendment is not a significant aid to interpretation of an act that was passed years before). See also *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (it is the intent of the Congress that enacted the original legislation that controls).

establish this conflict (1) by asserting that, unlike the statutes involved in the FAA trilogy, ADEA and other civil rights statutes implicate issues of broad public importance; (2) by asserting that arbitration inherently conflicts with ADEA's statutory scheme; and (3) by attacking the competency of the arbitral forum for resolving ADEA claims. Petitioner's Brief 15-24; Lawyers' Committee Brief 8-16; AARP's Brief 15-25. These assertions are without foundation.

**1. Statutes Under Which Compulsory Arbitration Has Been Upheld Have Broad Public Importance**

Petitioner and his *amici* argue vigorously that employment discrimination statutes are a "breed apart" from other federal statutes and have a broad public importance which precludes subjecting discrimination claims to compulsory arbitration. This kind of argument not only would require the lower courts to make inappropriate value judgments about the relative importance of federal laws of equal stature, but also ignores the fact that this Court's FAA trilogy similarly involved statutes of great public importance.

For example, in *Mitsubishi* the Court compelled the arbitration of claims arising under the Sherman Act, 15 U.S.C. §§ 1, *et seq.* (1988), which clearly implicates issues of broad public importance. Indeed, this Court itself has described the Sherman Act as "the Magna Carta of free enterprise," which is "as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). See also *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).<sup>12</sup>

<sup>12</sup> One commentator has stated:

It should also be understood that antitrust cases are political in the sense that the decisions of the courts in these cases actually make policy as to the character and structure of our

Like the Sherman Act, the Securities Act of 1933, 15 U.S.C. §§ 77a, *et seq.* (1988), implicates issues of broad public importance and is intended to do more than provide individuals with compensation for economic injuries. In *United States v. Naftalin*, 441 U.S. 768, 775 (1979), this Court stated:

[The 1933 Act] emerged as part of the aftermath of the market crash in 1929. . . . Indeed, Congress' primary contemplation was that regulation of the securities markets might help set the economy on the road to recovery. . . . Prevention of frauds against investors was surely a key part of that program, but so was the effort to achieve a high standard of business ethics . . . in every facet of the securities industry. [Citations omitted; emphasis in original.]

*Id.* at 775. That the Securities Act of 1933 was enacted to address issues of broad public importance is most clearly demonstrated by Senate Report 47:

The purpose of this bill is to protect the investing public and honest business. . . . The aim is to prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation; to place adequate and true information before the investor; to protect honest enterprise, seeking capital by honest presentation, against the competition afforded by dishonest securities offered to the public through crooked promotion; to restore the confidence of the prospective investor in his

society to a greater degree than in any other class of cases, except possibly a few cases in constitutional interpretation. The Supreme Court has said that the antitrust laws have a generality and adaptability comparable to that of constitutional provisions. President Franklin D. Roosevelt said that these laws "have become as much a part of the American way of life as the Due Process Clause of the Constitution." The scope and validity of the basic liberty sought to be secured by such written laws remain to be given by the courts.

Loevinger, *Antitrust, Economics and Politics*, 1 Antitrust Bull. 225 (1955).

ability to select sound securities; to bring into productive channels of industry and development capital which has grown timid to the point of hoarding; and to aid in providing employment and restoring buying and consuming power.

S. Rep. No. 47, 73d Cong., 1st Sess. 1 (1933), *quoted in Naftalin*, 441 U.S. at 775-76.

Similarly, in enacting the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, *et seq.* (1988), "Congress' aim . . . was not confined solely to compensating defrauded investors. Congress intended to deter fraud in the manipulative practices in the securities markets and to insure full disclosure of information material to investment decisions." *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986). The 1934 Act was adopted in recognition of the "enormous growth in power and impact . . . [securities] exchanges . . . [had on] our economy" and the need "to curb" the widespread abuses therein. *Silver v. New York Stock Exchange*, 373 U.S. 341, 350-51 (1963).

In short, all of the statutes involved in this Court's FAA trilogy addressed broad societal ills, yet the Court compelled the arbitration of claims arising under those statutes. The reason is obvious, since arbitrability turns not upon whether a court thinks the statutory right "important," but rather, upon whether Congress has indicated its intent to preclude compulsory arbitration. There being no such intention shown here, the Court should find that compelling arbitration of Petitioner's ADEA claim does not conflict with Congress's broad and important purpose of eradicating age discrimination in employment.

## 2. Arbitration Pursuant to an Individual Arbitration Agreement is Consistent With ADEA's Statutory Scheme

Contrary to the assertions of Petitioner and his *amici curiae*, compelling arbitration of Petitioner's ADEA claim is consistent with ADEA's detailed statutory



scheme. First, an individual arbitration agreement neither precludes a complainant from filing a charge with the Equal Employment Opportunity Commission ("EEOC"), as was demonstrated in this case (J.A. 5), nor precludes the EEOC from independently investigating and prosecuting a claim of age discrimination. See 29 U.S.C. § 626(b) (1988); 29 C.F.R. §§ 1626.4, 1626.13, 1626.15 (1988). Therefore, contrary to Petitioner's assertion, compelling arbitration of Petitioner's ADEA claim does not "undermine the role of the EEOC" with respect to ADEA enforcement. Petitioner's Brief 15.

Second, compelling arbitration of Petitioner's claim is also consistent with ADEA's "overlapping system of state, federal and administrative" forums. See Petitioner's Brief 21; AARP's Brief 23. In fact, *Rodriguez* teaches that a statute's provision of multiple forums is indicative of congressional intent to permit arbitration. As stated in *Rodriguez*, "arbitration agreements . . . are 'in effect, a specialized kind of forum-selection clause,' *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 . . . (1974), [and] should not be prohibited . . . , since they, like the provision for concurrent jurisdiction, serve to advance the objective of allowing [complainants] . . . a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." 104 L. Ed. 2d at 535-36. Moreover, to the extent that Petitioner relies upon the fact that a right of judicial action under ADEA survives adverse administrative determination by the EEOC, the same is true of parties' rights of action under the securities statutes at issue in *McMahon* and *Rodriguez*.<sup>13</sup>

<sup>13</sup> If the S.E.C. refuses to investigate or prosecute alleged violations of the Securities Acts, an individual complainant still has a private right of action. Compare *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196-97 (1976) (recognizing private right of action under § 10(b) of the 1934 Securities Exchange Act) with 15 U.S.C. §§ 78u, 78u-1 (authorizing S.E.C. to investigate and prosecute violations of the 1934 Securities Exchange Act); compare also section

Finally, compelling arbitration of Petitioner's ADEA claim does not inherently conflict with ADEA's enforcement provisions. The fact that the EEOC "cannot adjudicate claims or impose administrative sanctions" (Lawyers' Committee Brief 20 (quoting *Gardner-Denver*, 415 U.S. at 44)), but must rely upon the courts for "final . . . enforcement" (*id.*), does not compel the conclusion that Congress intended to preclude waiver of the judicial forum by an individual agreement to arbitrate. Under the Sherman Act, "final responsibility for enforcement is vested with the courts." 15 U.S.C. § 4. See Lawyers' Committee Brief 20 (quoting *Gardner-Denver*, 415 U.S. at 44). Furthermore, under the 1933 and 1934 Securities Acts, only courts have the authority to award damages and issue injunctive relief. See, e.g., 15 U.S.C. §§ 77k, 77l, 77t, 78i, 78p, 78r, 78u. Nonetheless, the Court found that waiver of the judicial forum was not precluded under the latter statutes, and it thus enforced individual arbitration agreements with respect to claims arising under those statutes. *Mitsubishi*, 473 U.S. at 640; *McMahon*, 482 U.S. at 238; *Rodriguez*, 104 L. Ed. 2d at 536.

### 3. The Arbitral Forum Is "Readily Capable" of Protecting and Vindicating Petitioner's Statutory Rights Under ADEA

Petitioner and his *amici* attack the adequacy of arbitration on three fronts: (1) questioning arbitrators' ability to deal with "complex" ADEA issues; (2) questioning the availability of remedies sufficient to ensure the eradication of age discrimination; and (3) questioning the adequacy of discovery, evidentiary rules and other procedural safeguards. By and large these arguments are merely "red herrings" inasmuch as this Court

12(2) of the 1933 Securities Act, 15 U.S.C. § 77l(2) (authorizing a private right of action for fraud in the sale of securities) with 15 U.S.C. § 77t (authorizing the S.E.C. to investigate and prosecute violations of the 1933 Act).



has previously concluded that, outside the collective bargaining context, none of these arguments warrants a determination that statutory claims are not arbitrable. See *Mitsubishi*, 473 U.S. at 632-37; *McMahon*, 482 U.S. at 231-42; and *Rodriguez*, 104 L. Ed. 2d at 434-36. Nevertheless, we deal briefly with each contention.

First, there is nothing particularly "complex" about most employment discrimination claims since such claims usually involve primarily questions of fact. Certainly such claims are no more complex than the antitrust and securities claims for which arbitration was approved in the Court's FAA trilogy. Moreover, whatever their complexity, this Court has unequivocally concluded that

potential complexity [of statutory claims] should not suffice to ward off arbitration. . . . [A]daptability and access to expertise are the hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal.

*Mitsubishi*, 473 U.S. at 633. See also *McMahon*, 482 U.S. at 239.<sup>14</sup>

Second, Petitioner's concern about inadequate remedies in the arbitral forum is unfounded. Arbitrators are creatures of the arbitration agreements under which they serve, and they can grant any remedy that is not foreclosed by those agreements.<sup>15</sup> Thus, if an arbitrator

<sup>14</sup> Indeed, a complaining employee who intends to rely substantially on statistical evidence to establish discrimination might find it more advantageous to present that case to an arbitral tribunal with statistical expertise than to a federal judge.

<sup>15</sup> For example, Rule 43 of the American Arbitration Association ("AAA") Commercial Arbitration Rules (as amended and in effect January 1, 1990) provides:

The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties. . . .

is considering a statutory claim, there is no reason that the parties may not agree that the arbitrator has the authority to grant any remedy that would be available in a judicial proceeding. Indeed, in the Court's FAA trilogy, the Court was not the least concerned about ordering arbitration of statutory claims that provided for treble damages and attorney's fees. *Mitsubishi*, 473 U.S. at 635-37; *McMahon*, 482 U.S. at 240-42; *Rodriguez*, 104 L. Ed. 2d at 533-37.

Furthermore, the Chamber is unaware of any general prohibition on arbitral claims containing "class" allegations. And even if there were some impediment to such class claims in arbitration, we have previously shown that the EEOC retains full authority to investigate and seek judicial relief for alleged discrimination even when an individual's specific claim is subject to arbitration. See Section C(2), *supra*. Thus, the EEOC would remain free to pursue any class claims relating to an employee's individual claim.

Finally, arguments about insufficient procedural safeguards in private arbitration have failed to convince this Court that arbitration of statutory claims creates any substantial risk to statutory rights. E.g., *McMahon*, 482 U.S. at 232. This is borne out in this case by the broad procedural rights and protections afforded by the New York Stock Exchange ("NYSE") Arbitration Rules that would govern petitioner's ADEA claim. See 2 N.Y.S.E. Guide (CCH) ¶¶ 2600-37 (1989).

Under the NYSE Arbitration Rules, a panel consisting of a majority of "public arbitrators" would resolve Petitioner's claim. NYSE Arbitration Rule 607(1), ¶ 2607.<sup>16</sup>

<sup>16</sup> A "public arbitrator" is an arbitrator who

1. is [not] a person associated with a member, broker/dealer, government securities dealer, municipal securities dealer, or registered investment adviser, or

Each arbitrator would be required to disclose any direct or indirect interests or relationships that are likely to affect impartiality or that might reasonably create an appearance of partiality in an arbitration to which he might be assigned. This duty of full disclosure precedes the arbitration and also continues throughout the proceeding. NYSE Arbitration Rule 610(c), (d), ¶ 2610. With this information, a party may exercise a peremptory challenge or move the Director of Arbitration to disqualify the arbitrator for cause. NYSE Arbitration Rule 609, ¶ 2609.

In addition to these procedural protections, the Petitioner is entitled to be represented by counsel at any stage of the arbitration. NYSE Arbitration Rule 614, ¶ 2614. Moreover, he or his attorney is entitled to engage in broad pre-arbitration discovery and utilize the subpoena process as provided by law. NYSE Arbitration Rule 619(a)-(g), ¶ 2619. In addition, a verbatim record of the arbitration hearing is to be kept by stenographic reporter or tape recording (NYSE Arbitration Rule 623, ¶ 2623), and a written award must be rendered and made public. NYSE Arbitration Rule 627(e), (f), ¶ 2627.

Finally, parties such as the Petitioner are protected from an improper arbitration award by the availability

2. has [not] been associated with any of the above within the past five (5) years, or

3. is [not] retired from or spent a substantial part of his or her business career in any of the above, or

4. is [not] an attorney, accountant or other professional who devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two (2) years, [and]

5. does not have a spouse or other member of the household who is a person associated with a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer or investment adviser.

See NYSE Arbitration Rule 607(a) (1)-(3), ¶ 2607.

of judicial review. The FAA provides that a court may vacate an arbitration award when it is established that the award is tainted by (1) corruption, fraud or undue means; (2) evident partiality or corruption on the part of an arbitrator; (3) misconduct on the part of an arbitrator; or (4) the exceeding or improper execution of an arbitrator's powers. 9 U.S.C. § 10. While an arbitration award will not be set aside due to a misinterpretation of the law, courts will vacate an award rendered "in manifest disregard of the law,"<sup>17</sup> and will also vacate an award that is irrational or contrary to public policy.<sup>18</sup> Such review "is sufficient to ensure that arbitrators comply with the requirements of the statute" at issue. *McMahon*, 482 U.S. at 232 (citing *Mitsubishi*, 473 U.S. at 636-37).

Given the availability of judicial review, the Court's findings in the FAA trilogy and the broad procedural protections and rights afforded the Petitioner under NYSE Arbitration Rules, the arbitral forum is "readily capable" of protecting and vindicating Petitioner's rights under ADEA.

<sup>17</sup> See, e.g., *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 265 (2d Cir. 1989); *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742, 746 (11th Cir. 1988); *Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631, 634 (10th Cir. 1988); *Clemons v. Dean Witter Reynolds, Inc.*, 708 F. Supp. 62, 63 (S.D.N.Y. 1989).

<sup>18</sup> See, e.g., *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1197 (7th Cir. 1987); *Amoco Overseas Oil Co. v. Astir Navigation Co.*, 490 F. Supp. 32, 37 (S.D.N.Y. 1979).

## CONCLUSION

For the foregoing reasons, the Chamber urges this Court to affirm the judgment of the Fourth Circuit compelling the arbitration of Petitioner's ADEA claim.

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DEC 19 1990

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CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

**ROBERT D. GILMER,**

*Petitioner,*

v.

**INTERSTATE/JOHNSON LANE CORPORATION,**  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

**BRIEF AMICI CURIAE OF THE  
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AND THE  
PROFESSIONAL EMPLOYMENT RESEARCH COUNCIL  
IN SUPPORT OF RESPONDENT**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

\_\_\_\_\_  
 No. 90-18  
 \_\_\_\_\_

ROBERT D. GILMER,

*Petitioner,*

v.

INTERSTATE/JOHNSON LANE CORPORATION,  
*Respondent.*

\_\_\_\_\_  
 On Writ of Certiorari to the  
 United States Court of Appeals  
 for the Fourth Circuit  
 \_\_\_\_\_

BRIEF AMICI CURIAE OF THE  
 EQUAL EMPLOYMENT ADVISORY COUNCIL  
 AND THE  
 PROFESSIONAL EMPLOYMENT RESEARCH COUNCIL  
 IN SUPPORT OF RESPONDENT  
 \_\_\_\_\_

The Equal Employment Advisory Council ("EEAC") and the Professional Employment Research Council ("PERC") respectfully submit this brief *amici curiae*. The written consents of all parties have been filed with the Clerk of this Court. The brief urges affirmance of the decision below and thus supports the position of Respondent before this Court.

INTEREST OF THE AMICI CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employ-



ment practices. Its membership comprises a broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its trade association members, are employers subject to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (Title VII), as well as other equal employment statutes and regulations. As employers, many of EEAC's members and member constituents have entered into contracts governing some or all terms and conditions of employment. Some of these agreements are entered into with individual employees, while others are reached with employee organizations through the collective bargaining process. Many such contracts include agreements to arbitrate. As potential respondents to charges of discrimination pursuant to the ADEA and other employment statutes, EEAC's members are interested in the extent to which a contractual commitment to arbitrate disputes arising out of the employment relationship is enforceable when the claim arises under the ADEA.

PERC is an organization composed of participants in the personnel placement service industry. Its membership includes franchisors, referral networks, companies, and the largest national association in the industry. In all, approximately 4,000 offices are represented in PERC, a number which approaches twenty-five percent of the entire industry. The vast majority of the offices represented are small businesses with five to ten employees.

Many of PERC's members and member constituents have employment agreements which utilize arbitration

agreements. This affords them the ability to resolve disputes in a manner that is more expeditious and less expensive and time-consuming than litigation. Since the owners are needed in the day-to-day management of their businesses and often are dependent on their own personal productivity, the time involved in even unfounded litigation could have a disastrous effect on their businesses.

Thus, the issues presented in this appeal are extremely important to the nationwide constituencies that EEAC and PERC represent. The court below held that the agreement between Petitioner and Respondent to arbitrate all claims arising out of their employee-employer relationship compelled arbitration of Petitioner's claim under the ADEA. This conclusion is consistent with this Court's more recent decisions regarding arbitration, and is not inconsistent with the language, the legislative history, or the purposes of the ADEA.

Because of its interest in the orderly application of the nation's civil rights laws, EEAC has filed briefs as *amicus curiae* in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC has briefed a number of cases involving the interface between arbitration or grievance procedures and statutory claims. *See McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984) (unappealed arbitration award does not have preclusive effect in case brought under 42 U.S.C. § 1983); *IUE, Local 790 v. Robbins & Meyers*, 429 U.S. 229 (1976) (filing a contractual grievance does not toll Title VII charge-filing period); *Becton v. Consolidated Freightways*, 687 F.2d 140 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) (arbitration decision that employee was discharged for just cause can be relied upon in a Title VII suit to show a valid reason for discharge); *Strozier v. General Motors*, 635 F.2d 424 (5th Cir. 1981) (knowing and voluntary acceptance of reinstatement and back pay under a grievance settlement constituted a waiver of the



right to file a later Title VII suit based upon the same facts).<sup>1</sup>

EEAC and PERC seek to assist the Court in this case by highlighting the impact its decision may have beyond the instant case in the field of employment dispute resolution generally. Accordingly, this brief brings relevant matter to the attention of this Court that has not already been brought to its attention by the parties. Because of their substantial experience, EEAC and PERC are uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

#### STATEMENT OF THE CASE

Respondent Interstate/Johnson Lane Corporation ("Interstate") hired Petitioner Robert D. Gilmer as a manager of financial services in May 1981. As a condition of his employment, Gilmer filed an application for securities registration with the New York Stock Exchange. The application contained an arbitration clause in which he agreed to arbitration of any employment dispute, including termination. Gilmer's employment was terminated in November 1987, and in August 1988 he filed an ADEA suit against Interstate in the United States District Court for the Western District of North Carolina. Pet. App. 3a-4a.<sup>2</sup>

<sup>1</sup> Furthermore, EEAC has participated in several cases in this Court involving proper interpretation of the ADEA, including *Public Employees Retirement System v. Betts*, 109 S.Ct. 2854 (1989); *Harbison-Walker Refractories v. Briek*, cert. dismissed, 487 U.S. 1216 (1988); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *Lorillard v. Pons*, 434 U.S. 575 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977). See also *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (standard for willful violations under the FLSA, Equal Pay Act and ADEA).

<sup>2</sup> The decision below, *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), from which the foregoing factual summary was drawn, is reproduced at Appendix to Petition for

Interstate filed a motion to compel arbitration pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* The district court denied the motion, and Interstate appealed. The Fourth Circuit reversed, concluding that enforcement of the arbitration agreement was appropriate under the FAA. Using the analysis outlined by this Court in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987), the Fourth Circuit found no indication of congressional intent to preclude arbitration in the ADEA's language, legislative history or underlying purposes. Pet. App. 3a.

#### SUMMARY OF ARGUMENT

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, mandates enforcement of agreements to arbitrate disputes, even when statutory claims are involved. In recent decisions, this Court has expressed increasing confidence in the arbitral process as a means of resolving claims, rejecting the traditional judicial attitude of hostility towards arbitration. The Court already has overruled one decision refusing to arbitrate a statutory claim on this basis.

In contrast, three older decisions involving arbitration clauses in collective bargaining agreements sharply criticize arbitration as a means of resolving statutory claims arising out of employment disputes, holding that arbitration under such circumstances should not be afforded preclusive effect. Because of this Court's changing view towards arbitration, and because those older cases involved collective bargaining agreements rather than individual agreements to arbitrate, those three decisions should not be applied to the instant case.

As this Court has explained, an arbitration agreement should be enforced as to statutory claims unless Congress

Certiorari ("Pet. App.") at 1a-36a. Citations to the Brief on the Merits for Petitioner are designated "Br. Pet."

has shown that it intended to preclude waiver of a judicial forum. This intent can be shown in any of three ways—through clear statutory language, legislative history, or an inherent conflict between arbitration and the purposes of the statute.

No such intent is shown in the Age Discrimination in Employment Act. The statutory language and legislative history are utterly devoid of any mention of arbitration. Moreover, the purposes of the Act do not conflict with dispute resolution by arbitration. Individual statutory rights are safeguarded, and the role of the Equal Employment Opportunity Commission remains unchanged.

In addition, sound public policy supports the enforcement of agreements to arbitrate. The increasing number of employment disputes that result in federal lawsuits, with the resultant overcrowding of the federal dockets, has prompted the Federal Courts Study Committee to propose arbitration as a solution. Arbitration offers a faster, less expensive approach to dispute resolution without sacrificing the rights of individuals that the ADEA was intended to protect. When an employee and employer have agreed to arbitrate their differences, such agreements are enforceable under the Federal Arbitration Act.

## ARGUMENT

### I. THE FEDERAL ARBITRATION ACT, BOLSTERED BY THIS COURT'S INCREASING CONFIDENCE IN THE ARBITRAL PROCESS, MANDATES ENFORCEMENT OF A PRIVATE AGREEMENT TO ARBITRATE EMPLOYMENT DISPUTES

The case before this Court seeks enforcement under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-15, of an individual agreement to arbitrate employment disputes. As the court below correctly recognized, this Court's earlier decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight Systems*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984), are inapplicable to this case for two important reasons. First, those cases predate this Court's series of decisions strongly endorsing enforcement of private agreements to arbitrate, and criticize the arbitral process on grounds later repudiated by this Court. Second, *Gardner-Denver*, *Barrentine* and *McDonald* all involved arbitration under collective bargaining agreements, and thus are not applicable to cases involving individual agreements to arbitrate.

#### A. Judicial Hostility to Arbitration as a Means for Resolving Statutory Claims Has Been Repudiated in This Court's Recent Decisions

##### 1. *Mitsubishi* (1985), *McMahon* (1987) and *Rodriguez* (1989) Express Increasing Confidence in the Arbitral Process

The FAA "was designed to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 n.14 (1985) (citations omitted).<sup>3</sup> The Act

<sup>3</sup> The key provision of the FAA is Section 2, which provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbi-



reflects a "liberal federal policy favoring arbitration agreements . . . guaranteeing the enforcement of private contractual arrangements . . . ." *Id.* at 625 (citations omitted). Indeed, "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," a concern which 'requires that [this Court] rigorously enforce agreements to arbitrate.'" *Id.* at 625-26.

This Court's 1985 *Mitsubishi* opinion is the first in this Court's uninterrupted series of decisions enforcing private agreements to arbitrate under the FAA even when statutory claims are involved.<sup>4</sup> *Mitsubishi* involved an arbitration agreement contained in an international commercial contract between an automobile manufacturer and a distributor. Finding no reason to diverge from the federal policy favoring arbitration merely because the claim was based on statutory rights, 473 U.S. 626, this Court ruled the agreement enforceable as to claims under the Sherman Act, 15 U.S.C. § 1 *et seq.*

Later, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Court addressed yet another

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tration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

<sup>4</sup> A number of earlier decisions foreshadowed *Mitsubishi* and its progeny. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1 (1983), this Court agreed with the court of appeals that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." 460 U.S. at 24. In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), the Court concluded that under the FAA, a motion to compel arbitration of otherwise arbitrable claims must be granted. 470 U.S. at 219.

demand for arbitration of statutory claims. There, the arbitration clause in question was contained in two agreements between securities customers and their broker. Emphasizing once again the federal policy favoring arbitration, the Court held that both a claim under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and one brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. § 1961 *et seq.*, must be arbitrated.

In *McMahon*, this Court cast substantial doubt on its earlier opinion in *Wilko v. Swan*, 346 U.S. 427 (1953), which had held that a judicial remedy for misrepresentation under Section 12(2) of the Securities Act of 1933 could not be waived by an arbitration agreement. As explained in *McMahon*, the Court ruled in *Wilko* that "the plaintiff's waiver of the 'right to select the judicial forum' . . . was unenforceable only because arbitration was judged inadequate to enforce the statutory rights created by § 12(2)." 482 U.S. at 228-29. The Court observed in *McMahon* that most of the reasons given in *Wilko*, which "reflect a general suspicion of the desirability of arbitration and the competence of arbitral tribunals," 482 U.S. at 231, subsequently had been rejected.

Most recently, in *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 109 S.Ct. 1917 (1989) this Court conclusively overruled *Wilko*. The decision noted that "[t]o the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." 109 S. Ct. at 1920. The Court ruled that an agreement to arbitrate claims under the Securities Act of 1933 was enforceable.



**2. *Gardner-Denver* (1974), *Barrentine* (1981) and *McDonald* (1984) Rest on an "Outmoded Presumption of Disfavoring Arbitration" and, in Any Event, Are Inapplicable to Cases Involving Individual Agreements To Arbitrate**

In light of the strong federal policy favoring arbitration, as expressed by Congress in the FAA and by this Court in *Mitsubishi*, *McMahon* and *Rodriguez*, it is important that the earlier decisions of this Court regarding arbitrability of statutory claims in the employment context, all of which concerned arbitration under collective bargaining agreements rather than individual contracts, not be applied indiscriminately without considering the impact of this Court's continuously increasing confidence in the arbitral process.

In *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), this Court ruled that submission of a claim of employment discrimination to arbitration under the nondiscrimination clause of a collective bargaining agreement does not preclude the right to a trial *de novo* under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* In *Barrentine v. Arkansas-Best Freight Systems*, 450 U.S. 728 (1981), the Court concluded that employees could bring suit under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, even though they already had submitted their claims to a joint grievance committee under the collective bargaining agreement. Finally, in *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984), the Court refused to allow an arbitration award under a collective bargaining agreement to have preclusive effect in a civil rights lawsuit under 42 U.S.C. § 1983.

Petitioner argues strongly that those cases control the outcome here. Because they rest in substantial part on concerns about arbitration that predated this Court's more favorable view expressed in *Mitsubishi*, *McMahon* and *Rodriguez*, however, their applicability is highly suspect, particularly where they are used to contend that in no circumstances should arbitration be required at all.

In *McDonald*, the Court articulated the four reasons set forth in *Gardner-Denver* and *Barrentine* for holding labor arbitration inadequate to protect federally-created rights. 466 U.S. at 290-292. First, the Court expressed concern that the expertise of labor arbitrators was limited to "the law of the shop, not the law of the land," *Gardner-Denver*, 415 U.S. at 57, so that arbitrators would not be competent to interpret complex legal issues with a more public focus. Second, the Court observed that where the contract delimits the arbitrator's authority, the arbitrator may lack the authority to enforce the statute in question. Third, the Court noted that in the collective bargaining context, the union, not the employee, controls the case. Fourth, the Court criticized the arbitral fact-finding process as inferior to the judicial process.

The dubious viability of these harsh criticisms of the arbitration process, as well as the inapplicability of these factors to cases involving individual agreements, were analyzed in detail in Judge Becker's cogent dissent in *Nicholson v. CPC International Inc.*, 877 F.2d 221 (3d Cir. 1989) (Becker, J., dissenting). Judge Becker carefully considered the listed factors in light of this Court's more recent decisions taking a more favorable view of arbitration.

The first and fourth factors, that arbitrators lack the necessary expertise and that the arbitration procedure itself is inferior, were explicitly rebuffed by this Court in *McMahon* when it criticized the *Wilko* rationale. In particular, the Court explained that "[i]n *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. . . . Likewise, we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." 482 U.S. at 232.

In *Rodriguez*, this Court described "[t]he Court's characterization of the arbitration process in *Wilko* [as] pervaded by what Judge Jerome Frank called 'the old judicial hostility to arbitration.'" 109 S. Ct. at 1920. This appellation is no less applicable to the same characterization articulated in *Gardner-Denver*. Accordingly, having been rejected by this Court, the "outmoded presumption of disfavoring arbitration proceedings," *id.*, should not be resurrected now. As this Court explained in *McMahon*, "'we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals' should inhibit enforcement of the [Federal Arbitration] Act 'in controversies based on statutes.'" *McMahon*, 482 U.S. at 226, quoting *Mitsubishi*, 473 U.S. at 627.

The second *Gardner-Denver* factor, that the arbitrator will enforce the contract, not the law, likewise was repudiated by this Court in *McMahon* as part of its critique of *Wilko*. This Court stated unequivocally that "there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." 482 U.S. at 232. Accordingly, as this Court stated in *Mitsubishi*, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628, quoted in *McMahon*, 482 U.S. at 229-30, and *Rodriguez*, 109 S. Ct. at 1920.

The fourth *Gardner-Denver* factor, that the arbitral forum is inadequate to enforce individual statutory rights because of union control of the process, is wholly inapplicable to the case at bar. *Gardner-Denver*, *Barrentine*, and *McDonald* all dealt with arbitration under collective bargaining agreements, and all three recognized the tension between the collective bargaining process, in

which rights are negotiated and arbitrated by unions on behalf of the group, and individual statutory guarantees of specific substantive rights. See, e.g., *Barrentine*, 450 U.S. at 734-35. Although *Gardner-Denver* expressed concern that the union may subjugate the rights of the individual to the rights of the group, this concern does not apply where, as here, the arbitration agreement was made with the individual employee and no union is involved.

Moreover, *Gardner-Denver*, *Barrentine*, and *McDonald* never discussed the applicability of the FAA—in all likelihood because of this Court's strong preference for using § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, rather than the FAA, to analyze collective bargaining agreements.<sup>5</sup> Thus, in those cases the Court did not have occasion to address the federal policy favoring arbitration established by the FAA.

Accordingly, to the extent that *Gardner-Denver*, *Barrentine* and *McDonald* reflect the type of judicial disfavor to arbitration that the Court has subsequently rejected, they should not be applied to the instant case. In addition, where that disfavor is rooted in a concern that the arbitration will be dominated by a union unwilling to champion individual rights, it is inapplicable to the individual arbitration agreement before the Court.<sup>6</sup>

<sup>5</sup> See, e.g., *General Electric Company v. Local 205, United Electrical, Radio and Machine Workers of America (U.E.)*, 353 U.S. 547, 548 (1957).

<sup>6</sup> The argument has been made that this Court's opinion in *Atchison, Topeka and Santa Fe Railway Company v. Buell*, 480 U.S. 557 (1987), decided after *Mitsubishi*, somehow reaffirms the continuing applicability of *Gardner-Denver* and its progeny to individual statutory claims. *Buell*, however, is yet another collective bargaining case, and inapplicable solely on that basis.



**B. The Recent EEOC Pronouncement Regarding Arbitration of ADEA Claims Is Not Entitled to Deference**

The recent EEOC Policy Guidance regarding arbitration of ADEA claims, EEOC Notice No. N-915-060 (August 29, 1990) (hereinafter "EEOC Notice"), should not be accorded any weight by this Court. The EEOC Notice takes the position advocated by Petitioner in this case that *Gardner-Denver*, *Barrentine* and *McDonald* preclude enforcement of an agreement to arbitrate claims under the ADEA. The Commission notes that *Gardner-Denver* involved a collective bargaining agreement, but concludes that *Gardner-Denver* should not be limited to its facts. EEOC Notice at 3 n. 4.

Unlike contemporaneous and constant agency interpretations of statutory language, the EEOC Notice is entitled to no special deference. Cf. *Public Employees Retirement Systems of Ohio v. Betts*, 109 S. Ct. 2854, 2863 (1989) (noting that EEOC regulation for which deference was claimed was not, in fact, adopted contemporaneously with the ADEA's enactment but took its present form more than ten years later). Here, the agency interpretation occurred a full twenty-three years after the ADEA was passed, and conveniently was prepared in time for this Court's consideration of the case. It, therefore, deserves no special deference from this Court.

**C. The Federal Arbitration Act Is Applicable to Individual Employment Agreements**

The three *amici curiae* filing briefs in support of Petitioner have argued that the Federal Arbitration Act is inapplicable to individual agreements to arbitrate. To the extent that such arguments may be relevant to the instant case,<sup>7</sup> they are incorrect, according to numerous consistent interpretations by the courts of appeals.

<sup>7</sup> As noted in *Respondent's Motion To Strike Portions Of Briefs Of Amici Curiae Filed In Support Of Petitioner*, this issue was not

Section 1 of the FAA, which defines "maritime transactions" and "commerce" for purposes of the FAA and outlines exceptions to the statute, states in pertinent part, ". . . nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. As explained in detail by the Third Circuit in *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America, (U.E.) Local 437*, 207 F.2d 450 (3d Cir. 1953), Congress' description of the types of workers excluded from FAA coverage is crucial. Under the statutory construction principle of *ejusdem generis*, the Third Circuit reasoned, specific identification of two groups of workers directly engaged in the transportation of goods in interstate commerce delimits the following phrase "or any other class of workers engaged in foreign or interstate commerce" to workers who are likewise occupied in the movement of goods in commerce. *Id.* at 452.<sup>8</sup>

Subsequent decisions of the courts of appeals have remained consistent with *Tenney*, adopting the Third Circuit's analysis and limitation of the FAA exclusion in cases involving both collective bargaining agreements and

raised by Petitioner below, nor was it presented to this Court, and thus should not be addressed by the Court.

<sup>8</sup> Thus, this Court's footnote in *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987), is not incompatible with the *Tenney* holding. Applying the FAA standard of reviewability to a labor arbitration award, this Court noted, "The Arbitration Act does not apply to 'contracts of employment of . . . workers engaged in foreign or interstate commerce,' 9 U.S.C. § 1, but the federal courts have often looked to the Act for guidance in labor arbitration cases." The Court in *Misco* was not ruling on the scope of the FAA exclusion. Moreover, under *Tenney*, it can fairly be said that collective bargaining agreements in the transportation industry, which encompasses a large number of such agreements, are excluded from the FAA.



individual agreements to arbitrate.<sup>9</sup> Indeed, using the *Tenney* analysis, courts have refused to apply the Section 1 exclusion to individual agreements to arbitrate executed by employees who, as here, work in the securities industry, on the grounds that they are not involved in the transportation of goods in interstate commerce. See *Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971). See also *Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 523 F.2d 433, 436 (6th Cir. 1975) (plaintiff account executives "do not seriously contend that . . . they fall within the exception . . ."). This Court itself has applied the FAA to arbitration agreements contained in an individual contract of employment substantially similar to the one Gilmer signed. *Perry v. Thomas*, 482 U.S. 483 (1987) (State statute permitting lawsuits for collection of wages regardless of the existence of an arbitration agreement is pre-empted by the FAA).

Given the clarity of the statutory language, there is no need to probe the legislative history to try to create a contrary result. *United Air Lines v. McMann*, 434 U.S. 192, 198-99 (1977) ("[L]egislative history . . . is irrelevant to an unambiguous statute."). Accordingly, the lengthy discussions of the FAA legislative history offered by Gilmer's *amici* can be disregarded.

<sup>9</sup> See, e.g., *Miller Brewing Company v. Brewery Workers Local Union No. 9, AFL-CIO*, 739 F.2d 1159 (7th Cir. 1984), cert. denied, 469 U.S. 1160 (1985) (Section 1 exclusion "limited to workers employed in the transportation industries"); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972) (professional basketball player not involved in the transportation industry and thus not excluded from FAA); *Signal-Stat Corporation v. Local 475, United Electrical, Radio and Machine Workers of America (UE)*, 235 F.2d 298 (2d Cir. 1956) (manufacturing workers not engaged in commerce, so that collective bargaining agreement not excluded by Section 1); *Hydrick v. Management Recruiters International, Inc.*, 738 F. Supp. 1434 (N.D. Ga. 1990) (stating "Indeed, if Congress had intended to exclude all employment contracts from the Act, it would have been unnecessary to identify specific categories of workers." *Id.* at 1435).

## II. VOLUNTARY ARBITRATION OF ADEA CLAIMS IS NOT INCONSISTENT WITH THE PURPOSES OF THE ACT AND IS SUPPORTED BY SOUND PUBLIC POLICY

### A. The FAA Requires Arbitration of Statutory Claims Unless Congress Intended Otherwise

The FAA, "standing alone, . . . mandates enforcement of agreements to arbitrate statutory claims," and only a contrary statement from Congress will override the FAA. *McMahon*, 482 U.S. at 226. In *McMahon*, this Court clarified the framework for evaluating the enforceability of agreements to arbitrate statutory claims. The groundwork for this analysis was laid in *Mitsubishi*, where the Court stated, "We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." 473 U.S. at 628. In *McMahon*, the Court restated that Congressional intent to override the FAA must be ascertainable from the statutory language or legislative history, "or from an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227 (citations omitted). The burden of demonstrating such Congressional intent is on the party who opposes arbitration. *Id.*

### B. The ADEA Does Not Preclude Voluntary Arbitration

The court below correctly concluded that Congress revealed no such intent in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* Pet. App. 7a. As the Fourth Circuit noted, even the Third Circuit, which reached a result contrary to the decision below in *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3d Cir. 1989), had to admit that neither the ADEA's statutory language nor its legislative history

mentioned arbitration, so that it was "forced to 'draw inferences from Congress' actions.'" Pet. App. 8a, *quoting Nicholson*, 877 F.2d at 197. Accordingly, under the *McMahon* analysis, the ADEA can be held to prohibit waiver of a judicial forum only if arbitration conflicts with the purposes of the statute.

The stated purposes of the ADEA are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). As the court below accurately determined, there is no "inherent conflict between arbitration and the [ADEA's] underlying purposes" that would signal Congressional intent to preclude waiver of a judicial forum for ADEA claims. Pet. App. 7a.

### 1. Arbitration Can Protect Individual Rights

To the extent that vindication of individual rights is a purpose of the ADEA, this Court's recent decisions reveal that arbitration offers no less valuable a remedy than the judicial process outlined in the statute. As noted above, this Court repeatedly has pointed out that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628, *quoted in McMahon*, 482 U.S. at 229-30, and *Rodriguez*, 109 S. Ct. at 1920. These substantive rights are well preserved by the arbitration process. One court explained the procedural safeguards available when ADEA claims are arbitrated as follows:

The commercial arbitration procedures are substantially similar to those in a judicial forum, . . . and the arbitrator has sufficient power to structure a remedy to eliminate age discrimination. . . . An arbitration decision under the Federal Arbitration Act

is explicitly subject to review in certain circumstances. . . . In addition, arbitral awards may be overturned if in manifest disregard of the law.

*Pierce v. Shearson Lehman Hutton*, 52 Fair Emp. Prac. Cases (BNA) 1882, 1884, *appeal dismissed for lack of jurisdiction*, No. 90-2079 (7th Cir. September 24, 1990) (stayed by district court pending outcome of *Gilmer*) (citations omitted). See also *McMahon*, 482 U.S. at 231-32 (confirming sufficiency of arbitration procedures and remedies). Even *Gardner-Denver*, while requiring a trial *de novo* after arbitration under a collective bargaining agreement, acknowledged that an arbitration decision could "give[] full consideration to an employee's Title VII rights," and that such a decision should be given "great weight" by the court. *Gardner-Denver*, 415 U.S. at 60 n.21.

It is true that the ADEA incorporates by reference the enforcement provisions of the Fair Labor Standards Act (FLSA). 29 U.S.C. § 626(b).<sup>10</sup> It is also true that this Court's decision in *Barrentine* held that employees could bring suit under the FLSA, 29 U.S.C. § 201 *et seq.*, even though they already had submitted their claims to a joint grievance committee under the collective bargaining agreement. *Barrentine*, however, does not control the outcome of this case.

First, it is clear that Congress incorporated the FLSA enforcement scheme into the ADEA not because it preferred a judicial remedy, but merely "for reasons of expediency," relegating ADEA charges to the Department of Labor Wage and Hour Division rather than the then-overworked Equal Employment Opportunity Commission (EEOC).<sup>11</sup> Moreover, while the FLSA provisions incor-

<sup>10</sup> These provisions include recordkeeping requirements, available remedies, including the statutory cause of action, and the statute of limitations. 29 U.S.C. §§ 211, 216 and 217.

<sup>11</sup> Note, *A Test of Arbitrability: Does Arbitration Provide Adequate Protection for Aged Employees?* 35 Villanova L. Rev. 389, 422 and n.171 (1990).



porated into the ADEA provide a judicial remedy, two other ADEA sections require the EEOC to attempt to resolve the parties' differences through conciliation, conference and persuasion—when a charge is filed, 29 U.S.C. § 626(d)(2), and before the EEOC can file its own lawsuit. 29 U.S.C. § 626(b). Accordingly, the statute gives substantial credence to efforts to resolve claims without litigation, a form of "voluntary dispute resolution." Finally, as noted earlier, *Barrentine* involves arbitration under a collective bargaining agreement, rather than an individual agreement to arbitrate as presented here.

## 2. Arbitration Does Not Interfere with the EEOC's Enforcement Role

Petitioner also argues that permitting employees to choose compulsory arbitration will undermine the EEOC's role in the statutory scheme to eliminate discrimination in employment. (Br. Pet. 15). This argument mischaracterizes the part the EEOC plays in the process.

The EEOC does not, and could not, handle all potential ADEA claims. First, employees are permitted to waive entire ADEA claims without EEOC involvement.<sup>12</sup> Indeed, Congress recently amended the ADEA to clarify the standards by which a waiver will be considered "knowing and voluntary" and therefore valid. Older Workers' Benefit Protection Act, Pub. L. 101-433 (1990). While early drafts of the bill would have re-

<sup>12</sup> *Bormann v. AT & T Communications, Inc.*, 875 F.2d 399, 402 (2d Cir.), cert. denied, 110 S. Ct. 292 (1989); *Cirillo v. Arco Chemical Company*, 862 F.2d 448, 451 n.1 (3d Cir. 1988); *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1016 (5th Cir. 1990); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.), cert. denied, 479 U.S. 850 (1986); *Lancaster v. Buierkle Buick Honda Co.*, 809 F.2d 539, 540 (8th Cir.), cert. denied, 482 U.S. 928 (1987). See also *Dorosiewicz v. Keyser-Roth Hosiery, Inc.*, No. 86-3163 (4th Cir. June 24, 1987) (unpublished). But see *Gormin v. Brown-Forman Corp.*, 744 F. Supp. 1100 (M.D. Fla. 1990), appeal docketed, No. 90-3719 (11th Cir. August 8, 1990).

quired EEOC supervision of such waivers, the final bill does not.<sup>13</sup> Just as nothing prohibits an employee from voluntarily waiving ADEA rights *in toto* or from resolving an ADEA dispute without EEOC participation, nothing in the ADEA prevents an employee from electing an arbitral rather than a judicial forum to resolve disputes. Indeed, as one federal judge has stated in a related context, "There is no suggestion in the statute or the circumstances leading to its enactment that when Congress gave ERISA plaintiffs 'ready access' to the federal courts, it was issuing an invitation to plaintiffs that they could not refuse." *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292, 299 (2d Cir.) (Cardamone, J., dissenting), vacated and remanded, 110 S. Ct. 225 (1989). The same holds true for the ADEA.

Moreover, an employee's election of arbitration as the forum for resolving an individual dispute does not preclude the EEOC from becoming involved in the case. As Judge Becker explained in detail in his dissent in *Nicholson*, an agreement to arbitrate cannot bar the EEOC from pursuing an investigation and seeking appropriate remedies. *Nicholson*, 877 F.2d at 238 and n.8 (Becker, J. dissenting). Indeed, the FAA by its terms applies only to lawsuits, not administrative proceedings, so that an individual would not be precluded from filing a charge. 9 U.S.C. § 3. Further, the arbitration agreement is binding only upon the parties to that agreement, not on third parties such as the EEOC.

<sup>13</sup> Compare S. 2856, 100th Cong., 2d Sess., 134 Cong. Rec. S14509 (daily ed. October 4, 1988), H.R. 5500, 100th Cong., 2d Sess., 134 Cong. Rec. H10154 (daily ed. October 12, 1988), and S. 54, 101st Cong., 1st Sess., 135 Cong. Rec. S168 (daily ed. January 25, 1989) (all requiring EEOC supervision for a waiver to be valid).



3. *"Legislative History" of Unenacted Legislation Is Not Germane to this Case and Cannot Evince Congressional Intent*

Petitioner cites language from the Conference Report on the vetoed Civil Rights Act of 1990 as "evidence" of congressional intent that ADEA claims not be subject to arbitration. The quoted language opines that arbitration agreements which encompass Title VII claims, whether in a collective bargaining agreement or private contract, do not preclude resort to the Title VII enforcement provisions. Br. Pet. 14, citing Conf. Rep. No. 856, 101st Cong., 2d Sess 26 (1990). The reference does not strengthen Petitioner's position for several reasons. The referenced legislation has not become law,<sup>14</sup> and thus is not considered as part of the congressional intent relevant to statutory construction of the ADEA.

Moreover, the quoted language does not reference the ADEA, even though other portions of the legislation sought to amend the ADEA by changing the timely filing requirements for charges and individual lawsuits. Conf. Rep. No. 856, 101st Cong., 2d Sess. 12. Thus, the ADEA logically could have been mentioned in the conference discussion of arbitration had the Conference Committee intended also to include the ADEA.<sup>15</sup> Accordingly, while the Conference Committee easily could have included the ADEA in its discussion of arbitration, it apparently chose not to do so. In short, this bit of history is irrelevant in the instant case, where the statute in question is the Age Discrimination in Employment Act, not Title VII.

<sup>14</sup> President Bush vetoed the bill, which would have made extensive amendments to Title VII, on October 22, 1990. Veto Message on S. 2104—Message from the President—PM 152. 136 Cong. Rec. S16457 (October 22, 1990).

<sup>15</sup> In addition, as discussed extensively above, the quoted statement goes substantially beyond *Gardner-Denver*, *Barrentine* and *McDonald*, which dealt solely with arbitration clauses in collective bargaining agreements, and thus cannot be considered as merely an endorsement of current law.

In any event, comments by members of Congress subsequent to the ADEA's enactment in 1967 are not relevant to establish the intent of the Congress that passed the ADEA. "The retroactive wisdom provided by the subsequent speech of a member of Congress stating that yesterday we meant something that we did not say is an ephemeral guide to history . . . . What happened after a statute was enacted may be history, and it may come from members of Congress, but it is not part of the legislative history of the original enactment." *Rogers v. Frito-Lay, Inc.* and *Moon v. Roadway Express, Inc.*, 611 F.2d 1074, 1080 (5th Cir.), cert. denied, 449 U.S. 889 (1980). Clearly, the legislative history of the ADEA is that which occurred prior to its enactment, and it is the ADEA that forms the basis for the instant action. Thus, pronouncements concerning measures that have not been enacted as amendments to the ADEA, and particularly those that have not become law at all, are of little value in interpreting the ADEA, which was passed over twenty years ago.

Indeed, this Court already has rejected comments regarding unenacted amendments to the ADEA itself as indicative of congressional intent. In *United Air Lines v. McMann*, 434 U.S. 192 (1977), holding that the ADEA as it then existed did not prohibit mandatory retirement pursuant to a bona fide plan established prior to the Act, the majority expressly rejected the contention that committee reports on pending legislation to amend the ADEA to prohibit mandatory retirement could be used to determine congressional intent concerning the ADEA, stating, "Legislative observations 10 years after passage of the Act are in no sense part of the legislative history." 434 U.S. at 200, n.7. See also *Bormann v. AT & T Communications, Inc.*, 875 F.2d at 402 ("the introduction of these [ADEA waiver] bills . . . are not an authoritative interpretation of what the ADEA meant when the statute was enacted in 1967."). See also *Pierce-v. Under-*

wood, 487 U.S. 552, 567-68, (1988) (subsequent Committee Report language contrary to settled law not controlling on the Court).

#### 4. Sound Public Policy Supports Arbitration of Employment Disputes

Voluntary binding arbitration of employment disputes is consistent with the developing theory supporting arbitration as a method for relief of the serious overcrowding of the federal courts. The Federal Courts Study Committee, which seeks to offer solutions to the problems of the federal judiciary, has observed that the number of employment discrimination cases filed in the federal courts has increased by over two thousand percent since 1969. Report of the Federal Courts Study Committee at 61 (April 2, 1990). Recognizing this extraordinary growth to be an important factor in the current overcrowding in the courts, the Committee recommended that the EEOC be authorized to conduct voluntary binding arbitration of Title VII cases. *Id.* at 60-61. The Committee's position underscores the need to reduce, not increase, the number of court proceedings in employment discrimination cases. The Committee reasoned:

One measure to assist these workers may lie outside the federal judiciary: voluntary arbitration by the EEOC. Arbitration would benefit those employers and employees who would prefer to try to settle their dispute before the agency rather than—or before trying—federal court litigation. And it might provide some caseload relief to the federal courts.

*Id.* at 61.

"Congress passed the Federal Arbitration Act . . . to help legitimate arbitration and make it more readily useful to disputants. The hope has long been that the Act could serve as therapy for the ailment of the crowded docket." *Securities Industry Association v. Connolly*, 883 F.2d 1114, 1116 (1st Cir. 1989), *cert. denied*, 110 S.Ct.

2559 (1990). Arbitration provides an extrajudicial means by which disputes that typically arise in an employment setting, such as whether there existed proper cause for discharge, can be resolved in a more efficient and less expensive manner without further burdening our overcrowded court system. Given the increasing number of civil cases that are filed in federal district courts, it is essential that alternative methods of resolving disputes short of litigation be explored and encouraged. In cases such as this, where an employee and employer have voluntarily agreed to submit their differences to a neutral arbitrator for resolution under a procedure that offers full and fair protection of substantive rights in a less costly and cumbersome forum than the court system, such an agreement should be encouraged, and indeed, must be enforced under the Federal Arbitration Act. In this manner, the Court can foster the preservation of scarce judicial resources without sacrificing the rights of individuals that the ADEA was designed to protect.

**CONCLUSION**

For the foregoing reasons, EEAC respectfully submits that the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

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ROBERT D. GILMER,

Petitioner,

v.

INTERSTATE/JOHNSON LANE  
CORPORATION,

Respondent.

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On Writ of Certiorari To The  
United States Court Of Appeals For The  
Fourth Circuit

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RESPONDENT'S MOTION FOR LEAVE  
TO SUBMIT SUBSEQUENT AUTHORITY

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RESPONDENT'S MOTION FOR LEAVE  
TO SUBMIT SUBSEQUENT AUTHORITY

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In accordance with Rule 21,  
Respondent, Interstate/Johnson Lane  
Corporation, moves for leave to  
submit the Second Circuit Court of

Appeal's decision in Bird v. Shearson Lehman/American Express, Inc., No. 90-7688 (2d Cir., January 17, 1991) (Bird II) (reprinted in appendix to this motion) as subsequent authority. Respondent presents the following grounds supporting this motion:

1. On January 15, 1991, oral argument was heard in this case. During Respondent's argument, counsel relied upon the Supreme Court's order vacating and remanding the Second Circuit Court of Appeals' decision in Bird I. Shearson Lehman/American Express, Inc. v. Bird, 100 S.Ct. 225 (1989), vacating and remanding 871 F.2d 292 (2d Cir. 1989) (Bird I). This matter was also noted in

Respondent's Brief on the Merits, pages 41-42 n.21.

2. In Bird I, the Second Circuit had denied enforcement of an arbitration agreement as to claims for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA). This Court vacated and remanded that ruling for reconsideration in light of this Court's decision in Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

3. On January 17, 1991 the Second Circuit issued its decision in Bird II. The court reversed the district court decision on remand that had refused to enforce an arbitration agreement as to the plaintiffs' ERISA claims and



overruled its prior decision in Bird I. In doing so, the appeals court enforced the securities firm's arbitration agreement with the plaintiffs, even as to the plaintiffs' claims under the remedial provisions of ERISA. It relied upon this Court's recent decisions in Rodriguez de Quijas and in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987). The appeals court held that arbitration was not foreclosed by the text or legislative history of ERISA and was consistent with the remedial purposes of that statute. The court also distinguished this Court's decisions in Alexander v. Gardner-Denver Co., 415 U.S. 36

(1974); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981); and McDonald v. City of West Branch, 466 U.S. 284 (1984), based on the collective bargaining context in which those cases arose. This decision therefore supports Respondent's argument for affirmance of the Fourth Circuit's decision in the present matter.

4. The January 17, 1991 decision from the Second Circuit was not available at the time Respondent filed its Brief on the Merits or during oral argument on this case. However, Respondent's counsel noted the significance of Bird I during oral argument. This most recent decision fully supports Respondent's arguments before the Court and, therefore, should be

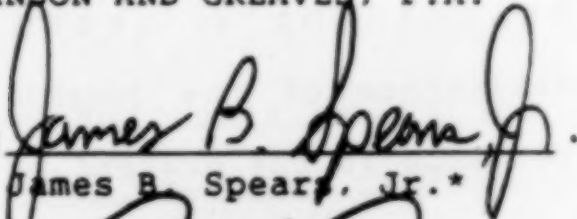
brought to the Court's attention as expeditiously as possible.

Dated this 22nd day of January, 1991.

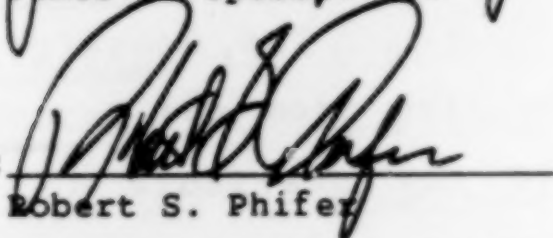
Respectfully submitted,

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# CERTIFICATE OF SERVICE

I, James B. Spears, Jr., do hereby certify that I have this day served a copy of the within and foregoing Respondent's Motion for Leave to Submit Subsequent Authority by placing copies of same in the United States Mail, properly addressed and with the correct amount of postage affixed thereto, to the following persons:

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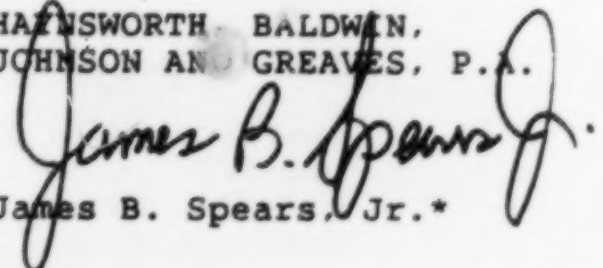
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APPENDIX



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 721

August Term 1990

(Argued December 13, 1990

Decided January 17, 1991)

Docket No. 90-7688

FRANK L. BIRD, Trustee of the Frank L.  
Bird Profit Sharing Trust, FRANK L.  
BIRD, Individually, and JOAN SHEA

Appellees.

v.

SHEARSON LEHMAN/AMERICAN EXPRESS, INC.,  
and RAYMOND R. CLEMENTS

Appellants.

Before:

TIMBERS, KEARSE and MINER, Circuit  
Judges.

Appeal from an order entered July  
16, 1990 in the District of Connecticut,  
Jose A. Cabranes, District Judge,  
denying appellants' motion to compel  
arbitration of appellees' ERISA claim

and to stay proceedings in the district court pending arbitration.

Reversed and remanded.

Judge Kearse filed a dissenting opinion.

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Jeffrey L. Friedman, New York, N.Y. (Theodore A. Krebsbach, New York, N.Y., on the brief) for appellants Shearson Lehman/American Express, Inc. and Raymond R. Clements.

Donald R. Holtman, Hartford, Conn. (Katz & Seligman, Hartford, Conn., on the brief) for appellees Frank L. Bird, Trustee of the Frank L. Bird Profit Sharing Trust, Frank L. Bird, Individually, and Joan Shea.

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TIMBERS, Circuit Judge:

Appellants Shearson Lehman/American Express, Inc. (Shearson) and Raymond R. Clements appeal from an order entered July 16, 1990 in the District of Connecticut, Jose A. Cabranes, District Judge, denying their motion to compel arbitration of a claim brought by

appellees Frank L. Bird, Individually and as Trustee of the Frank L. Bird Profit Sharing Trust, and John Shea for breach of fiduciary duty pursuant to the Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1001 et seq. (1988).

On appeal, appellants contend that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (1988), requires that agreements to arbitrate statutory ERISA claims are enforceable.

For the reasons that follow, we reverse the judgment of the district court and remand for proceedings consistent with this opinion, including arbitration forthwith.

## I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

Frank L. Bird is the Trustee and a participant and beneficiary in the Frank L. Bird Profit Sharing Trust (the Trust). Joan Shea is a participant and beneficiary in the Trust. The Trust was established to provide for the retirement of its participants and beneficiaries and is governed by the terms of ERISA.

Raymond Clements, a broker and vice president of Shearson, solicited Bird as a client. Bird was interested in investing the assets of the Trust. At their first meeting, Bird alleges that he explained to Clements that the investment objectives for the Trust were

long-term growth and safety of the Trust's assets. In his capacity as Trustee, Bird invested all the assets of the Trust in a securities account with Shearson.

Bird signed Shearson's standard "Customer's Agreement" prior to opening the account. That agreement contained an arbitration clause which provided that

"Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect."

All of the Trust's assets, a total of \$62,205.56, were deposited in the



account. Fifty-five transactions were made in the account between July 24, 1984 and May 28, 1986. At the end of that period, \$13,427.53 remained in the account. Appellees allege that the assets of the Trust were diminished due to mishandling by appellants, who allegedly made high risk investments on behalf of the Trust in disregard of the stated investment objectives of the Trust.

On July 21, 1987, appellees commenced this action and filed the complaint in the District of Connecticut. Count one of the complaint alleged a breach of fiduciary duties under ERISA, 29 U.S.C. § 1104 (1988). Count two alleged that that account had been churned in violation of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j)

(1988), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1990). The complaint also set forth various state law claims; these subsequently were dismissed.

On August 18, 1987, appellants filed a motion invoking the arbitration clause in the Customer's Agreement and seeking a stay of proceedings in the district court. The district court granted the motion as to the securities law claim, but denied the motion as to the ERISA claim. We affirmed the district court's decision. Bird v. Shearson Lehman/American Express, Inc., 871 F.2d 292 (2 Cir. 1989) (Bird I). We held that Congress intended to preclude a waiver of judicial remedies for statutory ERISA claims, but not for

contractual claims involving ERISA-covered plans. Id. at 298.

Appellants filed a petition for a writ of certiorari in the Supreme Court. In the meantime, the Supreme Court filed its opinion in Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917 (1989). In Rodriguez, the court held that agreements to arbitrate statutory claims arising under the Securities Act of 1933 were enforceable. Subsequently, the Court granted certiorari in Bird I, vacated our judgment, and remanded the case for reconsideration in light of Rodriguez. Shearson Lehman/American Express, Inc. v. Bird, 110 S. Ct. 225 (1989).

On January 19, 1990, we entered an order remanding the case to the district court for reconsideration in light of

Rodriguez. On July 16, 1990, the district court, in a thoughtful opinion, affirmed its original decision. The district court reasoned that "Rodriguez [was] consistent with the Supreme Court's other recent rulings on arbitration and therefore [did] not significantly change the legal landscape in which this issue was originally considered." The district court held that statutory ERISA claims were not subject to compulsory arbitration. The court denied appellants' motion to compel arbitration and for a stay of the district court proceedings pending arbitration.

The appeal followed.

## II.

Initially, we set forth our standard of review. "[A] court asked to stay proceedings pending arbitration in a case covered by the [FAA] has essentially four tasks: first, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then determine whether to stay the balance of the proceedings pending arbitration." Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 844 (2 Cir. 1987) (citations omitted). We review the district court's

determinations on those issues de novo. Id. at 846.

In Bird I, we affirmed the district court's holding that Bird and Shearson entered into a valid arbitration agreement that encompassed the ERISA claim. Bird I, supra, 871 F.2d at 295. We see no reason to disturb that holding. Accordingly, the only issue before us on that instant appeal concerns the third element, i.e., whether Congress intended statutory claims created by ERISA to be nonarbitrable.

## III.

We turn first to appellants' contention that the FAA requires that their agreement to arbitrate be enforced notwithstanding the fact that appellees'



claim is for a breach of fiduciary duties under ERISA. We agree.

In Bird I, we held that the text of ERISA--particularly the provisions for exclusive federal jurisdiction of statutory claims, the remedial nature of the statute, and the underlying purposes of ERISA--compelled the conclusion that "Congress intended the federal courts to be the exclusive forum for resolving disputes of substantive rights." Bird I, supra, 871 F.2d at 295. We are told that Bird I was motivated, in part, by an "outmoded presumption of disfavoring arbitration proceedings". Rodriguez, supra, 109 S. Ct. at 1920. Rodriguez makes it clear that that is no longer tenable. Accordingly, we now reach a contrary result.

The FAA, "reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place contracts . . . ." Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974) (footnote and citation omitted). Section 2 of the FAA Provides that "an agreement in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1988). "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial

Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); see also Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985) (the FAA "requires that we rigorously enforce agreements to arbitrate").

The "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987). Congress, however, may override the presumption favoring arbitration agreements by a contrary provision in another statute. Id. The burden of demonstrating such congressional intent rests with the party opposing arbitration. Rodriguez, supra, 109 S. Ct. at 1921; McMahon, supra, 482 U.S. at

227. The party contending that an agreement to arbitrate a statutory claim is not enforceable must show that "Congress intended in a separate statute to preclude a waiver of judicial remedies . . . ." Rodriguez, supra, 109 S. Ct. at 1921. "[S]uch an intent 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes." McMahon, supra, 482 U.S. at 227 (citations omitted).

Applying these standards in a series of recent cases, the Supreme Court has upheld arbitration agreements involving various statutory claims. E.g., McMahon, supra, 482 U.S. at 227-38 (claim under § 10(b) of the Securities Exchange Act of 1934); id. at 238-42

(claim under civil provisions of Racketeer Influenced and Corrupt Organizations Act); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628-40 (1985) (claim under Sherman Antitrust Act). Most recently, the Court held that agreements to arbitrate claims brought pursuant to the Securities Act of 1933 are enforceable. Rodriguez, supra, 109 S. Ct. at 1919-21. In so holding, the Court (unfortunately) overruled its holding in Wilko v. Swan, 346 U.S. 427 (1953) (a 1933 Act decision), which it stated "rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law" and had "fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving

disputes." Rodriguez, supra, 109 S. Ct. at 1920. In so doing, the Court ignored the command of Congress that waiver of any provisions of the 1933 Act would not be countenanced. Wilko, supra, 346 U.S. at 434-35; 15 U.S.C. § 77n (1988).

Prior to Rodriguez, courts of appeals that considered the enforceability of agreements to arbitrate claims derived from ERISA reached varying conclusions. Compare Bird I, supra, 871 F.2d at 298 (agreement to arbitrate statutory ERISA claims is not enforceable) and Barrowclough v. Kidder, Peabody & Co., Inc., 752 F.2d 923, 941 (3 Cir. 1985) (same) with Arnulfo P. Sulit, Inc. v. Dean Witter Ryenolds, Inc., 847 F.2d 475, 477-79 (8 Cir. 1988) (agreement to arbitrate statutory ERISA claim is



enforceable). No court of appeals has considered this issue since Rodriguez. This case is one of first impression.

## (A)

We consider next the text and legislative history of ERISA. We find nothing in the text or legislative history explicitly addressing the issue of whether Congress intended to preclude a waiver of a judicial forum for claims arising from the substantive guarantees of ERISA. We also find nothing in the text or legislative history that compels us to reach that conclusion by implication.

We are aware that one of the means by which Congress sought "to protect . . . participants in employee benefit plans and their beneficiaries"

was "by providing . . . ready access to the Federal courts." 29 U.S.C. § 1001(b) (1988). This provision, however, does not speak to whether Congress intended to require that parties avail themselves of that forum. Sulit, supra, 847 F.2d at 478. It does not follow that "by permitting a federal judicial forum Congress also intended to override the Arbitration Act's aim of ensuring the enforcement of privately made agreements in which parties . . . have chosen to forego an available judicial forum in favor of arbitration." Id. at 479.

Similarly, the fact that Congress provided for exclusive federal jurisdiction of claims brought to enforce ERISA's substantive provisions, 29 U.S.C. § 1132(e) (1988), speaks only

to which judicial forum is available, not to whether an arbitral forum is available. Moreover, the Supreme Court has upheld an arbitration agreement which was involved in a dispute grounded in a statute that similarly provides for exclusive federal jurisdiction. E.g., McMahon, supra, 482 U.S. at 227 (Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1988)). In short, "any claim that the jurisdictional language of ERISA evidences a congressional intent to foreclose arbitrability would appear to be untenable in light of McMahon and [Rodriguez]." Southside Internists Group v. Janus Capital Corp., 741 F. Supp. 1536, 1541 (N.D. Ala. 1990).

Liberal procedural provisions that facilitate bringing ERISA claims in

federal court pursuant to § 1132 also do not compel a conclusion that Congress intended such claims to be nonarbitrable. The Supreme Court rejected that reasoning in Rodriguez. It declined to imply such an intent based on similar provisions that govern claims brought in the federal courts pursuant to the Securities Act of 1933. Rodriguez, supra, 109 S. Ct. at 1920.

We hold that ERISA's test and legislative history do not support a conclusion that Congress intended to preclude arbitration of claims brought pursuant to it.

(B)

We turn next to whether arbitration is inconsistent with ERISA's underlying purposes. We hold that it is not.

In its statement of findings and declaration of policy, Congress explained the circumstances leading to the passage of ERISA and the purpose of the legislation:

"that despite the enormous growth in [pension] plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that is therefore desirable . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness."

29 U.S.C. § 1001(a) (1988). "A reading of the statute's legislative history compels the conclusion that ERISA's purpose is to secure guaranteed pension

payments to participants by insuring the honest administration of financially sound plans." Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911, 914 (2 Cir.), cert. denied, 459 U.S. 1039 (1982); see also Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989) ("ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefits plans,' and 'to protect contractually defined benefits'" (citations omitted)). Allowing parties to provide by agreement that their disputes will be resolved in arbitration is not inconsistent with those purposes.

"By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their



resolution in an arbitral, rather than a judicial, forum." Mitsubishi, supra, 473 U.S. at 628. Thus, arbitration is inconsistent with the underlying purposes of a statute "where arbitration is inadequate to protect the substantive rights at issue." McMahon, supra, 482 U.S. at 229.

A presumption that arbitration is an inadequate forum in which to resolve disputes based on complex federal statutes is untenable in light of recent Supreme Court decisions. McMahon, supra, 482 U.S. at 232; Mitsubishi, supra, 473 U.S. at 633-34. Rodriguez put to rest "the old judicial hostility to arbitration." Rodriguez, supra, 109 S. Ct. at 1920 (citation omitted). Appellees suggest no reason why the substantive rights guaranteed by ERISA

will be jeopardized if the arbitration agreement is enforced. We are aware of no such reasons. As in Rodriguez, "[t]here is nothing in the record before us nor in the facts of which we can take judicial notice, to indicate that the arbitral system . . . would not afford the plaintiff[s] the rights to which [they] are entitled." Id. at 1921 (citation omitted). Accordingly, we disagree with those courts that have expressed the fear that substantive rights guaranteed by ERISA may be foreclosed by an arbitration agreement. E.g., Barrowclough, supra, 752 F.2d at 941; Amaro v. Continental Can Co., 724 F.2d 747, 752 (9 Cir. 1984).

Similarly, ERISA's remedial nature, Firestone, supra, 489 U.S. at 108, is not compromised "so long as the

prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, [since] the statute will continue to serve . . . its remedial . . . function." Mitsubishi, supra, 473 U.S. at 614. The Supreme Court has upheld agreements to arbitrate claims arising under other remedial statutes. E.g., McMahon, supra, U.S. at 240 (considering remedial role of RICO); Mitsubishi, supra, 473 U.S. at 636-37 (considering remedial role of antitrust legislation).

Appellees contend that their view is supported by a line of cases that held that arbitrations of claims under Title VII of the Civil Rights Act of 1964, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Fair Labor Standards Act, Barrentine v.

Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981), and 42 U.S.C. § 1983 (1988), McDonald v. City of West Branch, 466 U.S. 284 (1984) were not preclusive in subsequent litigation to vindicate rights under those statutes. We disagree.

In those three cases, the arbitrations were commenced pursuant to a clause in a collective bargaining agreement negotiated by the union, rather than the employee. They rely partially on the reasoning that an employee should not be bound by an arbitration clause he did not negotiate "where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." Barrentine, supra, 450 U.S. at 737. The

Court was concerned with the fact that the union's interest might not coincide with the employee's and, therefore, the union's representation at arbitration might not be adequate. McDonald, supra, 466 U.S. at 291; Barrentine, supra, 450 U.S. at 742; Gardner-Denver, supra, 415 U.S. at 58 n.19.

The instant case does not raise such concerns. Bird signed the agreement that contained the arbitration clause. He cannot complain that his rights were bargained away by a third party. Although Shea did not sign the agreement, her interest and claims are essentially identical to Bird's. Under such circumstances, requiring Shea to arbitrate does not work an injustice. Cf. Barrowclough, supra, 752 F.2d at 938-39 (beneficiaries are bound by

principal's agreement to arbitrate when they "claim no present entitlement to the [benefits] and press no claims separate from his").

We also do not find arbitration inconsistent with the enforcement and oversight responsibilities granted to the Secretary of Labor. The Secretary is involved in reporting requirements, 29 U.S.C. § 1021 (1988), is authorized to commence an action for a plan fiduciary's breach of duty, 29 U.S.C. § 1132(a)(2) (1988), and is authorized to participate in litigation commenced by plan participants, 29 U.S.C. § 1132(h) (1988). Moreover, the Secretary is vested with broad investigatory powers to determine compliance with ERISA's provisions. 29 U.S.C. § 1134 (1988). "We are reluctant to conclude that the



mere fact of administrative involvement in a statutory scheme of enforcement operates as an implicit exception to the presumption of arbitral availability under the FAA." Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 198 (4 Cir.), cert. granted, 111 S. Ct. 41 (1990). Arbitration of ERISA claims will not impede the Secretary's supervisory and enforcement responsibilities. "[I]mplementation of the statutory purpose is [not] dependent upon the [Secretary's] involvement in each and every allegation [under ERISA]." Id.

Finally, one of the purposes of ERISA is to "bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state." H.R. Rep. No.

533, 93rd Cong. 1st sess. 12 (1973), reprinted in 1874 U.S. Code Cong. & Admin. News 4639, 4650. This desire has led the Supreme Court to conclude that Congress intended that "courts . . . develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" Firestone, supra, 489 U.S. at 110 (citation omitted). We are not persuaded that the fact that federal common law is to be created and applied to ERISA disputes alleging breaches of fiduciary duties creates an inherent conflict with arbitration.

First, we do not believe that our holding will prevent the development of federal common law in this area. Our holding does not prohibit plaintiffs from bringing ERISA claims alleging a breach of fiduciary duty in federal

courts. We merely hold that parties may provide by agreement that such claims will be arbitrated. If such agreements are the result of unequal bargaining power between the parties, general principles of contract law will bar enforcement. Second, the import of recent Supreme Court decisions is that arbitration is not to be distrusted no matter what the source of law to be applied is. Third, an arbitration determination is subject to review by the federal courts through a motion to enforce or to vacate the award.

Arbitration is not inconsistent with the underlying purposes of ERISA. Appellees have not sustained their burden of demonstrating that the text, legislative history, or underlying purposes of ERISA indicate that Congress

intended to preclude a waiver of a judicial forum for claims arising under it. Accordingly, we hold that statutory claims arising under ERISA may be the subject of compulsory arbitration.

#### IV.

To summarize:

We hold that Congress did not intend to preclude a waiver of a judicial forum for statutory ERISA claims. We further hold that the FAA requires courts to enforce agreements to arbitrate such claims. The district court, therefore, erred in denying appellants' motion to compel arbitration of appellees' ERISA claim and for a stay of the district court proceedings pending arbitration.

Reversed and remanded with instructions that arbitration proceed promptly. The mandate shall issue forthwith.

KEARSE, Circuit Judge, dissenting:

I respectfully dissent from the majority's conclusion that an agreement to arbitrate future claims of breach of fiduciary responsibility under ERISA, 29 U.S.C. § 1101 et seq. (1988), is enforceable. Despite the general federal policy favoring arbitration, see, e.g., Moses H. Cone Memorial Hospital v. Mercury Constriction Corp., 460 U.S. 1 (1983), arbitration should not be ordered where there is "an inherent conflict between arbitration and the statute's underlying purposes," Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987). I believe there is such a conflict between arbitration and ERISA.

The underlying purpose of ERISA is "to protect . . . the interests of



participants in employee benefit plans and their beneficiaries: by, inter alia, "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for . . . ready access to Federal courts." 29 U.S.C. § 1001 (b) (1988). In an effort to achieve this purpose, Congress declined to adopt the traditional "reasonably prudent man dealing with his own property" standard for defining the scope of a fiduciary's duties. Rather, it intended that there be developed carefully tailored standards that (1) would vary depending on the capacity in which the fiduciary was acting and the expertise normally associated with that capacity, see 29 U.S.C. § 1104 (1)(B) ("a fiduciary shall discharge his duties with respect to a

plan . . . with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity . . . would use in the conduct of an enterprise of a like character and with like aims"), and (2) would reflect a particular sensitivity to the need to protect pension rights, see 29 U.S.C. § 1001(b) (goal of ERISA is "to protect . . . the interests of participants in employee benefit plans and their beneficiaries"). Congress intended that the courts, in fashioning the appropriate principles, would develop a new body of federal common law.

The legislative history of ERISA makes plain that Congress intended this new federal common law to be uniform and predictable. The congressional reports,

in explaining why Congress chose to codify such a fiduciary responsibility requirement rather than relying on traditional principles of trust law, repeatedly noted the importance of creating a consistent source of law to help fiduciaries, administrators, and plan participants predict the legality of the fiduciaries' actions. Thus, the House of Representatives report stated as follows:

[W]ithout . . . access to the courts and without standards by which a participant can measure the fiduciary's conduct he is not equipped to safeguard either his own rights or the plan assets. Furthermore, a fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state. It is expected that courts will interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of

employee benefit plans intends to be effectuated by the Act.

. . . . The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions . . . .

H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), reprinted in 1974 U.S. Code Cong. & Admin. News ("USCCAN") 4639, 4650. The Senate report was virtually identical. See S. Rep. No. 127, 93d Cong. 1st Sess. 29 (1973), reprinted in 1974 USCCAN 4838, 4865. The conference report on ERISA also noted that "[t]he conferees expect that the courts will interpret th[e] prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 302

(1974), reprinted in 1974 USCCAN 5038, 5083.

Congress's effort to promote the development of a uniform federal common law is reflected principally in ERISA's provision that only federal courts, and not state courts, have jurisdiction over fiduciary-duty claims under ERISA. See 29 U.S.C. § 1132(e)(1). In addition, Congress included a provision (a) requiring that in every ERISA action for breach of fiduciary responsibilities, a copy of the complaint must be served on the Secretary of Labor, and (b) allowing the Secretary to intervene in any such action. See 29 U.S.C. § 1132(h). Both of these provisions further the goal of developing a uniform, consistent, and predictable body of ERISA fiduciary-responsibility law. This goal may well

be frustrated with respect to fiduciary-duty claims against brokerage houses, however, if such claims are decided in arbitration. There are at least two reasons why this is so. First, a clear set of principles is unlikely to emerge since an arbitrator need not state any reasons for his decision. Second, judicial review of arbitration decisions is limited.

There is no general requirement that arbitrators of commercial disputes explain the reasons for an arbitration decision. See American Arbitration Association Commercial Arbitration Rule 42, reprinted in Alternative Dispute Resolution Techniques 2.042, 2.048 (1989) (requiring only that award itself be in writing). Nor do the American and New York Stock Exchanges require that



arbitrators in securities disputes involving member firms give reasons for their decisions. See American Stock Exchange Rule 618(3) (requiring only that the award summarize the demands, the issues, the results); New York Stock Exchange Rule 627(e) (same). Though public interest groups have urged that arbitration decisions resolving securities disputes be required to include written statements of the arbitrators' reasons for their decisions, the SEC has refused to require any such statement of reasons. See 54 Fed. Reg. 21,144, 21,151 (May 16, 1989) (SEC Order approving other proposed rule changes relating to securities arbitration). A decision without a stated rationale does little to develop the law, or to provide

guidance for plan beneficiaries and fiduciaries, or to provide predictability as to the outcome of disputes. The SEC itself noted that in the absence of such statements "awards rendered by arbitrators in prior cases will not predict the vote or outcome of future cases." Id. at 21,152.

Further, in the absence of such statements, there will be no assurance that the arbitrators have followed whatever precedent there may be. And apparently, in the securities industry, they often do not. In 1988 congressional hearings on arbitration reform, a securities industry spokesman noted that arbitrators in the industry are regarded as being free to grant or deny awards without complying with applicable legal standards. See, e.g., Arbitration

Reform: Hearings on H.R. 4960 Before the Subcomm. on Telecommunications and Finance of the Comm. on Energy and Finance, 100th Cong., 2d Sess. 85-86 (statement of Theodore Krebsbach, vice president and associate general counsel of Shearson Lehman Brothers). The spokesman stated that arbitrators frequently made decisions that did not reflect legal standards but rather sought to do rough justice: "A lot of times . . . you don't say one person is 100 percent wrong or 100 percent right and you do what makes sense under the circumstances." Id. at 138. A member of the plaintiffs' bar concurred. See id. (statement of Theodore G. Eppenstein, Esq.) ("many times arbitration panels will split the baby[:] . . . the way they split it.

they will try to figure out how much the claimant has to pay his attorney and that will be the size of the award . . .").

Finally, though judicial review of arbitration decisions is available, its scope is severely limited. The standard of review is highly relaxed, for such decisions may be set aside only for "manifest disregard" of "clearly governing legal principle[s]," not merely because of "an arguable difference regarding the meaning or applicability of laws." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933-34 (2d Cir. 1986). And this standard is made even more difficult for the disappointed disputant to meet when the arbitrators have stated no reasons for their decision. Indeed,

the SEC in support of its decision not to require written opinions explaining arbitration awards, stated that such opinions would generally serve no purpose, since "[e]ven if awards contained errors of law, . . . a mistake of law is not currently grounds for vacating an arbitration award." See 54 Fed. Reg. 21,144, 21,151 n.45. Given the widespread use of arbitration clauses in brokerage firms' standard customer contracts, together with the lack of any requirement of a stated rationale in the arbitrators' decision and the very limited scope of judicial review, there is no likelihood that enforcement of such agreements will permit development of a carefully tailored, or uniform, or predictable body of law as to the fiduciary duties

of brokers in dealing with ERISA pension plans.

In sum, I would conclude that broad-scale arbitration of ERISA fiduciary-responsibility claims would conflict with ERISA's goal of providing carefully tailored fiduciary duty principles and be antithetical to the goals of uniformity and predictability. Our prior ruling in the present case, holding the arbitration agreement unenforceable, was vacated by the Supreme Court and remanded for consideration in light of Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U. S. 477 (1989), see Shearson Lehman/American Express, Inc. v. Bird, 110 S. Ct. 225 (1989), vacating and remanding 871 F.2d 292 (2d Cir. 1989). Rodriguez did not alter the



principle that arbitration agreements should not be enforced when there is an inherent conflict between arbitration and the statute's underlying purposes. I would uphold the district court's refusal to enforce the arbitration agreement here on the ground that there is an inherent conflict between arbitration and Congress's intention not to permit the resolution of ERISA fiduciary-duty disputes by the application of rough justice, ad hoc and sub silentio.